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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

VICKIE L. EDWARDS and KATHLEEN ROSE MCCAULLEY,
Petitioners,

v.

THE CITY OF SANTA BARBARA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err by upholding, despite the free speech, press, and assembly guarantees of the First and Fourteenth Amendments, an ordinance which bans "[a]ll expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities" on portions of public sidewalks?

2. Did the court of appeals err by treating this Court's decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), as justifying *ordinances of general application* (not injunctions) creating "speech-free zones" on public sidewalks?

PARTIES

The caption of the case contains the names of all of the parties to the proceeding in the court below. Neither of the petitioners is a corporation. *See* S. Ct. Rule 29.6.

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No. 98- _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

VICKIE L. EDWARDS and KATHLEEN ROSE MCCAULLEY,
Petitioners,

v.

THE CITY OF SANTA BARBARA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners Vickie L. Edwards and Kathleen Rose McCaulley, plaintiffs-appellees in the court below, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in the case at bar.

DECISIONS BELOW

All decisions in this case to date are entitled *Edwards v. City of Santa Barbara*. The decision of the district court initially denying a preliminary injunction is unreported. App. B. The decision of the district court granting the renewed motion for preliminary injunction is reported at 883 F. Supp. 1379 (C.D. Cal. 1995). App. C. The order of the Ninth Circuit vacating and remanding is noted at 70 F.3d 1277 (9th Cir.

1995). App. D. The decision of the district court reissuing the preliminary injunction in pertinent part is unreported. App. E. The decision of the Ninth Circuit reversing in pertinent part is reported at 150 F.3d 1213 (9th Cir. 1998). App. A. The order of the Ninth Circuit denying rehearing is unreported. App. H.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued the decision for which petitioners seek review on August 11, 1998. The Ninth Circuit denied rehearing on October 6, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE

The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix I. The text of Ordinance No. 4812 of the City of Santa Barbara is set forth in Appendix J.

STATEMENT OF THE CASE

Petitioners Vickie L. Edwards and Kathleen Rose McCaulley engage in a variety of expressive activities -- distributing leaflets, one-on-one verbal counseling, carrying signs -- on public sidewalks in the vicinity of abortion facilities in Santa Barbara, California. Petitioners have at all times conducted themselves in a peaceful and law-abiding manner.

On May 18, 1993, the respondent City of Santa Barbara ("City") adopted the ordinance challenged in the case at bar. The ordinance ("Ord.") which the City enacted contains the following "demonstration ban" provision (or "driveway provision"), which petitioners challenge:

> No person shall conduct any *demonstration activity* within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area.

Ord. § 9.99.030 (emphasis added).[1] The ordinance defines

---

[1] "**Driveway area**" is defined as:

> DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

Ord. § 9.99.010(E). "**Health care facility**" is defined as:

> HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

Ord. § 9.99.010(B). "**Place of worship**" is defined as:

> PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances. parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

Ord. § 9.99.010(C).

"demonstration activity" as:

> DEMONSTRATION ACTIVITY. *All expressive and symbolic conduct, whether active or passive*, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

Ord. § 9.99.010(D) (emphasis added). The "driveway area" where the demonstration ban applies includes the public sidewalk crossing a driveway. Ord. § 9.99.010(E). By its terms, the demonstration ban covers the "driveway area" itself, plus the public sidewalk within eight feet of that driveway in any direction. Ord. § 9.99.030. Hence, the ordinance bans "demonstration activity" along stretches of sidewalk extending some twenty-five to thirty feet or more in length, depending upon the width of the "driveway area."

Petitioners filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the demonstration ban[2] and alleging that the ban chilled and restricted their expressive activities. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343.

The district court initially denied petitioners' motion for a preliminary injunction. App. B. Upon consideration of petitioners' renewed motion, the district court enjoined enforcement of the demonstration ban. App. C.

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[2]Petitioners also brought a constitutional challenge to another part of the Santa Barbara Ordinance imposing a "floating buffer zone" restriction. Petitioners prevailed on that issue in both the district court and the Ninth Circuit. *See* App. A, C, E. Thus, that aspect of petitioners' lawsuit is not pertinent here.

In its analysis, the district court explained that, under the demonstration ban (which the district court called the "Driveway Provision"),

> all expressive activity, whether peaceful or harassing, vocal or silent, is prohibited within the eight-foot zone on either side of the driveway leading to the clinic. [The city has] thus banned all forms of expressive activity, even silent prayer or expressive t-shirts, from the driveway areas of every medical facility and place of worship in Santa Barbara.
>
> It is axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum. *See, e.g., Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) ("We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech") . . . .
>
> The Driveway Provision effectively creates a First Amendment "free zone" in which no one may engage in expressive activity of any kind. *See Jews for Jesus*, 482 U.S. 569, 574. Such a blanket ban necessarily prohibits more expressive conduct than is necessary to achieve the purpose of the Ordinance. Like the resolution at issue in *Jews for Jesus*, the Driveway Provision "prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing" within eight feet of every driveway leading up to every medical facility and place of worship in Santa Barbara. *Id.* It also prevents traditionally favored activities such as leafletting and handbilling. *See Ward* [*v. Rock Against Racism*], 491 U.S. [781,] 799, n. 7 [(1989)] ("[A] ban on handbilling,

> of course, would suppress a great quantity of speech that does not cause evils that it seeks to eliminate") . . . .

Edwards v. City of Santa Barbara, 883 F. Supp. 1379, 1389 (C.D. Cal. 1995) (additional citations and footnote omitted). The district court also pointed out that

> the Driveway Provision . . . criminalizes expressive activity *qua* expressive activity, without relating such expression to its effect on impeding access to the clinic. Such a sweeping ban on protected First Amendment activity cannot withstand constitutional scrutiny. It is simply not narrowly tailored to achieve its averred purpose, the protection of ingress to and egress from clinics and churches.

Id. at 1390 (footnotes omitted). Finally, the district court rejected the argument that either a narrow construction or a selective enforcement of the ordinance could somehow rescue its overbroad provisions:

> It is axiomatic . . . that Santa Barbara cannot avoid the overbreadth problem by narrowing the problematic provision through selective enforcement:
>
> > It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.
>
> [*City of Houston v.*] *Hill*, 482 U.S. [451,] 466 [(1987)] . . . . According the policy "unconstitutional discretion in enforcement" does not save an overbroad ordinance. *Id.* . . .

> In this case, the Driveway Provision fails to pass muster under the First Amendment because it incorporates the constitutional infirmity of the Ordinance's overbroad definition of demonstration activity and thereby criminalizes the entire universe of expressive activity. Such overbreadth cannot be saved by selective enforcement, no matter how well intentioned.

Edwards, 883 F. Supp. at 1390 (additional citations omitted).

The City appealed, and the Ninth Circuit vacated and remanded in light of its own erroneous -- but at the time, not yet corrected -- decision in another case.[3] *See Edwards v. City of Santa Barbara*, 70 F.3d 1277 (9th Cir. 1995). App. D.

On remand, the district court again enjoined enforcement of the ban on "demonstration activity." App. E. The City appealed once more. This time, the Ninth Circuit -- in the decision from which petitioners now seek review in this Court -- reversed on the merits and upheld the demonstration ban. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998). App. A.

In a short *per curiam* opinion, the Ninth Circuit gave only cursory analysis to the issues. With a three-sentence paragraph, the court of appeals brushed aside constitutional objections to the demonstration ban. 150 F.3d at 1216. The court of appeals relied upon this Court's recent decisions

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[3]In that other case, the Ninth Circuit, after remand from this Court, ultimately reversed itself. *See Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *vacated*, 519 U.S. 1144 (1997), *on remand*, 120 F.3d 161 (9th Cir. 1997).

involving speech-restrictive *injunctions*, not ordinances, in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). Observing that this Court "has upheld much larger fixed buffer zones using the more rigorous standard for content-neutral *injunctions*," the Ninth Circuit concluded that "[a]gainst this background, the driveway provision [i.e., demonstration ban] does not sweep too broadly." *Edwards*, 150 F.3d at 1216 (emphasis added).

The Ninth Circuit did *not* explain why the standard this Court fashioned for analyzing *injunctions* against proven malefactors had any relevance to an *ordinance* restricting the free speech of the public at large. The Ninth Circuit likewise did *not* state whether it believed that *Madsen* and *Schenck* had overruled *sub silentio* this Court's precedents invalidating ordinances and statutes imposing bans on peaceful expressive activity along public sidewalks. Indeed, the court below simply ignored these precedents regarding ordinances and statutes. Finally, the court of appeals made no attempt to reconcile the ban on the universe of expressive activity contained in the Santa Barbara ordinance with this Court's decision in *Jews for Jesus* invalidating a ban of similar overbreadth.

Petitioners filed a timely petition for rehearing, which the Ninth Circuit denied on October 6, 1998. App. H.

Petitioners filed in the Ninth Circuit a timely motion to stay the mandate pending the filing of a petition for certiorari. The Ninth Circuit granted that motion on October 26, 1998. App. F. Pursuant to the stipulation of the parties, the Ninth Circuit then specifically ordered that the City suspend enforcement of the demonstration ban (a.k.a. "driveway provision") until "a final determination by the United States Supreme Court is made." App. G.

REASONS FOR GRANTING THE WRIT

This case presents a constitutional challenge, based upon the First Amendment right to free speech, to a bizarre anti-speech ordinance of the City of Santa Barbara. The challenged provision forbids "demonstration activity," defined to mean "[a]ll expressive and symbolic conduct, whether active or passive," including "distributing literature" and "engaging in oral or silent protest, education or counseling activities," in traditional public forum properties (viz., stretches of public sidewalks). Ord. § 9.99.010(D). (The ordinance in its entirety is attached as Appendix J.) The "demonstration ban" provision of the challenged ordinance thus bans *the universe of expressive activity* on *traditional public forum property*, namely, sidewalks. The ordinance contains no exception for any speech whatsoever, *banning even consensual expression.* No conceivable interest can justify this overbroad restriction on pure speech.

The Ninth Circuit has set itself in conflict with the basic premises of First Amendment adjudication. The decision below is simply revolutionary; it upholds an ordinance imposing a flat ban on the universe of expressive activity along public sidewalks.

This startling decision merits review for numerous reasons, including those set forth below.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF BOTH THIS COURT AND THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT.

A. Overbreadth of Ban on "All Expressive and Symbolic Conduct Whether Active or Passive"

The incredibly overbroad definition of "demonstration activity" in the Santa Barbara ordinance places the decision below in direct conflict with this Court's treatment of a similarly sweeping ban on speech:

> On its face, the [restriction] at issue in this case reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual "First Amendment Free Zone" . . . . The [restriction] does not merely regulate expressive activity . . . that might create problems such as congestion or the disruption of the activities of [others]. Instead, the [restriction] . . . prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters [the area covered by the restriction] may be found to violate the [restriction] by engaging in some "First Amendment activity." *We think it obvious that such a ban cannot be justified even if [the relevant area] were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.*

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576-75 (1987) (emphasis added in part; some editing marks omitted).

The decision below also conflicts with the decision of the U.S. Court of Appeals for the D.C. Circuit in *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387 (D.C. Cir. 1990). In *Turner*, the D.C. Circuit reviewed a constitutional challenge to a regulation imposing, *inter alia*, a permit requirement and number restrictions on "free speech activities" in the Washington, D.C. Metro system. *Id.* at 1389 (setting forth regulation). The D.C. Circuit held that the regulation's "extremely broad definition of free speech activities," *id.* at 1394, rendered the regulation unconstitutional as not narrowly tailored to any legitimate interests. *Id.* at 1392, 1394; *see also id.* at 1397 (Williams, J., concurring in judgment) ("Instead of identifying problem conduct, [defendant in its regulation] started with the entire universe of free speech activity and then applied some limitations. As a result, it swept up far more speech than posed any real concern").

In the present case, by contrast, the Ninth Circuit saw no constitutional defect with a ban on "[a]ll expressive and symbolic conduct, whether active or passive, [including] oral or silent protest, education or counseling activities." Ord. § 9.99.010(D).

B. Overbreadth of Total Ban on Speech on Public Sidewalk

By imposing a total ban on speech in segments of a public sidewalk, the City has *pro tanto* repealed the public forum status of those sidewalks. The district court did not miss this point. In a well-reasoned discussion, Judge Richard A. Gadbois, Jr., observed that it is "axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum." *Edwards v. City of Santa Barbara*, 883 F. Supp. 1379, 1389 (C.D. Cal. 1995) (citing cases). As this Court has explained,

> Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be "public forum" property. . . . [Government] may not by its own ipse dixit destroy the "public forum" status of streets and parks which have historically been public forums.

United States v. Grace, 461 U.S. 171, 179-80 (1983) (editing marks altered).

The statute overturned in *Grace*, while broad, was not so broad as the Santa Barbara ordinance challenged herein. The *Grace* statute did "not, for example, purport to prohibit any oral expression, on any subject." *Id.* at 181 n.10. The Santa Barbara ordinance, by contrast, bans even oral and silent expression. *See* § 9.99.010(D).

As *Grace* demonstrates, the abrogation of free speech rights in a traditional public forum is no less unconstitutional just because the restriction only abolishes a small segment of the available public forum property. *Id.* at 179 ("small geographical area"). "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

II. THE DECISION BELOW DISTORTS THIS COURT'S MADSEN DECISION INTO AUTHORITY TO UPHOLD ORDINANCES AND STATUTES OF GENERAL APPLICATION IMPOSING FLAT BANS ON SPEECH IN TRADITIONAL PUBLIC FORA.

Perhaps most distressing and dangerous was the legal theory which the Ninth Circuit employed. By erroneously transplanting precedents governing *court injunctions* into the field of *state and municipal legislation*, the Ninth Circuit opened the door to widespread enactment of statutes and ordinances imposing *flat bans* on speech in traditional public fora. The court below reasoned as follows: *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), held injunctions to a *stricter* standard than ordinances. *Madsen* upheld the constitutionality of a *large* "fixed buffer zone," on a public sidewalk, under the *stricter* standard for injunctions. Therefore, the court below concluded, the *smaller* zone at issue here *a fortiori* passes the relatively *lower* standard for reviewing the constitutionality of ordinances. App. 5a-6a.

This syllogism is false and must be forcefully and forthrightly rejected before it spawns a rash of similar decisions.[4]

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[4]These concerns are not purely hypothetical. In the court below, over three dozen municipalities as *amici* stated that at least some of them already "have enacted or would like to enact ordinances similar to the Santa Barbara ordinance," Br. of Amici Curiae the City and County of San Francisco, et al. at 3, *Edwards v. City of Santa Barbara*, No. 95-56790 (9th Cir. filed Dec. 2, 1996). *See also* D. Avila, "Abortion 'squelch zone' too broadly drawn," *The Boston Globe* (July 22, 1998), p. 23 (Massachusetts state legislature considering bill which would create statutory 25-foot buffer zones around abortion facilities).

An injunction by its nature is limited to particular malefactors and thus, while held to a stricter standard of review, nonetheless can "sentence" adjudged wrongdoers to restrictions that would simply be unthinkable if imposed upon the innocent public at large. For example, courts sometimes impose "no contact" injunctive orders in certain domestic disputes or cases of "stalking." Such fact-specific, defendant-specific, anti-speech directives could never pass muster as general speech-restrictive ordinances. Therefore, the constitutionality of an injunctive provision issued in a particular case does *not* logically dictate the constitutionality of a *legislative* restriction of similar -- or even more modest -- dimensions applied to the general public.

Under the faulty reasoning of the court below, this Court's opinions in *Madsen* and in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which upheld speech-free "buffer zones" in injunctions issued against those found to have engaged in repeated misconduct, justify *a fortiori* the imposition of similar zones *against the general public* by means of ordinances and statutes. This is flatly inconsistent with Supreme Court precedent. *E.g.*, *Grace*; *Thornhill v. Alabama*, 310 U.S. 88 (1940). This reasoning would in effect sound the death knell for the rights to leaflet, picket, and even speak, on public sidewalks.

CONCLUSION

The decision below squarely conflicts with established precedents of this Court. Just as important, the decision below dramatically distorts another whole line of precedent -- this Court's decisions regarding speech-restrictive injunctions -- thereby placing those precedents on a collision course with the public forum doctrine.

This Court should grant the present petition for a writ of certiorari.

Respectfully submitted,

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December 23, 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56790
VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,
v.
CITY OF SANTA BARBARA,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

No. 96-56262
VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,
v.
CITY OF SANTA BARBARA,
Defendant-Appellant.

No. 96-56558
VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,
v.
CITY OF SANTA BARBARA,
Defendant-Appellant.

Appeals from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

OPINION

Argued and Submitted November 3, 1997
Pasadena, California

Filed August 11, 1998

Before: JAMES R. BROWNING, MELVIN BRUNETTI and FERDINAND F. FERNANDEZ, Circuit Judges.

PER CURIAM

Vickie Edwards and Kathleen McCaulley, two "sidewalk counselors," challenged an ordinance of the City of Santa Barbara, California limiting demonstration activity near health care facilities and places of worship, passed after a protracted history of harassment by anti-abortion protestors. The ordinance prohibits demonstration within eight feet of entrances to medical facilities or places of worship, and permits a patient or worshiper to create an eight foot "floating buffer zone" or "bubble" within one hundred feet of such entrances by asking the demonstrator to withdraw.[1] The district court preliminarily enjoined enforcement of the ordinance. We remanded for reconsideration in light of *Sabelko v. City of Phoenix*, 68 F.3d

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[1] *See* Section 9.99.030 ("the driveway provision" or "fixed buffer zone" prohibiting demonstration within eight feet of entrances to medical clinics or places of worship); *see also* Section 9.99.020 (the "bubble" or "floating buffer zone" permits people within one hundred feet of such entrances to request that anyone who approaches them "withdraw to a distance of . . . eight feet").

1169 (9th Cir.1995). On remand, the district court enjoined three of the four challenged provisions, upholding only the floating buffer zone within one hundred feet of a health care facility. The plaintiffs successfully moved for supplemental fees and costs. The City appealed the grant of the injunction and the award of fees and costs.

In the interim, the Supreme Court vacated our decision in *Sabelko* and remanded in light of *Schenck v. Pro-Choice Network of Western New York*, 117 S.Ct. 855 (1997). On remand, we held the Phoenix floating buffer zone provision unconstitutional and enjoined its enforcement. *See Sabelko v. City of Phoenix*, 120 F.3d 161, 165 (9th Cir.1997).

Guided by *Schenck* and *Sabelko*, we affirm the district court's preliminary injunction enjoining enforcement of the floating buffer zone provision. However, we conclude the fixed driveway provisions are a reasonable time, place, and manner restriction, and vacate the preliminary injunction of their enforcement.

I.

Ordinance 4812 prohibits all demonstration activity within a specified distance of health care facilities and places of worship without regard to the message conveyed.[2] Because it is content neutral, the ordinance passes constitutional muster if it is "narrowly tailored to serve a significant government interest and . . . leave[s] open ample alternative channels of communication." *Frisby v. Schultz*, 487 U.S. 474, 482 (1988)

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[2]It is undisputed that the ordinance prohibits speech in a traditional public forum. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 479-82 (1988).

(internal quotations omitted).[3] Although the regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests[,] . . . it need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989).[4]

A single legitimate government interest may be sufficient to sustain a content-neutral regulation. *See, e.g., Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 n. 13 (1981) (declining to consider second and third interests advanced by the state to justify a time, place, and manner restriction because the first adequately supported the regulation). The City contends three valid interests are served by the ordinance: (1) protecting persons seeking medical

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[3]Plaintiffs argue the ordinance was designed to suppress their viewpoint. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (local ordinance struck down because of viewpoint bias reflected in the legislative history). However, an ordinance may be motivated by a concern about the effects of speech without running afoul of the First Amendment. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986). The fact that a majority of those prosecuted under the ordinance have been anti-abortion protesters does not permit an automatic inference of discriminatory purpose in its adoption.

The plaintiffs also argue that the ordinance has been selectively enforced against them, citing the deposition responses of two police officers to hypothetical questions. This argument lacks force, given the small number of citations issued by these two officers and the fact that thirty-one other officers issued the remaining citations. Moreover, the training video clearly shows the Deputy City Attorney explaining that all demonstration activity is prohibited regardless of the "side."

[4]*See also Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764-65 (1994) (announcing a newly heightened standard for content-neutral injunctions, but restating the *Ward* test for legislative enactments of general applicability).

services or engaging in worship from harassment or intimidation; (2) ensuring access to medical facilities and places of worship; and (3) ensuring traffic safety. The Supreme Court has held these interests sufficient. *See Schenck*, 117 S.Ct. at 866 (government interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services" are "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics"). The City must also demonstrate that the ordinance is "narrowly tailored" to serve these valid interests and "leave[s] open ample alternative channels of communication." *Ward*, 491 U.S. at 791.

II.

In district court, the plaintiffs-appellees successfully challenged the driveway provisions creating a fixed buffer zone within eight feet of the entrances to medical facilities and places of worship, as well as the floating buffer zone in connection with places of worship.[5]

1. Driveway provisions.

Recent Supreme Court precedent has upheld much larger fixed buffer zones using the more rigorous standard for content-neutral injunctions. *See Madsen*, 512 U.S. at 770; *Schenck*, 117 S.Ct. at 868. Against this background, the driveway provision

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[5]The district court upheld the floating buffer zone within one hundred feet of a health care facility and the plaintiffs have not appealed that decision. On October 6, 1997, in light of our decision upon remand from the Supreme Court in *Sabelko*, the district court granted plaintiffs' renewed motion for preliminary injunction barring enforcement of the floating buffer zone as applied to health care facilities.

does not sweep too broadly. A distance of eight feet is not too great to limit most forms of protest, and conversation is easily possible at that distance. The provision is narrowly tailored to the City's objectives: it ensures access to health care facilities by providing a clear, easily enforced zone of protection for the driveway entrances; facilitates the free flow of traffic by preventing protesters from blocking entrances; and furthers the City's interest in public safety and prevents direct "face to face" confrontations that could escalate into violence by physically separating demonstrators from persons entering the driveway areas. *See Schenck*, 117 S.Ct. at 866.

Although the driveway provision in connection with places of worship is unrelated to the City's interest in protecting patients in need of medical care, it is narrowly tailored to the City's interest in ensuring access to religious worship. It permits ample alternative avenues of communication, by placing no limit on speech or expressive activity outside a narrow zone.

2. Floating buffer zone.

With respect to the floating buffer zone, our decision in *Sabelko*, invalidating an eight-foot buffer zone on the grounds that it was not narrowly tailored, is dispositive. Like the provision challenged here, the invalidated buffer zone could be invoked within one hundred feet of a clinic. Unlike the ordinance challenged in Sabelko, Santa Barbara's ordinance has a severability clause. We, therefore, need not invalidate the entire ordinance. *See Sabelko*, 120 F.3d at 165.

III.

On appeal, the plaintiffs have prevailed on only one of their challenges to the ordinance. We therefore vacate the original award and the supplemental award of attorneys' fees

and costs and remand for redetermination of the amount due.[6] The district court should arrive at a reasonable fee award by identifying the specific hours expended on the floating buffer zone provision or by reducing the overall award to reflect the plaintiffs' limited success. *See Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 791-92 (1989).

Each party shall bear its own costs.

REVERSED IN PART; AFFIRMED IN PART; ATTORNEYS' FEES AND COSTS VACATED.

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[6]The district court clearly stated the applicable standard for evaluating Section 1988 awards in its October 24, 1995 order, granting the plaintiffs' motion for attorneys' fees. The supplemental award of fees and costs was also within the discretion of the district court. In each instance, the request for fees was supported by billing statements.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 94-2243 RG (JRx)

VICKIE L. EDWARDS, *et al.*,

Plaintiffs,

v.

CITY OF SANTA BARBARA, *et al.*,

Defendants.

ORDER RE PRELIMINARY INJUNCTION

May 24, 1994

Plaintiffs Motion for Preliminary Injunction came on for hearing before this Court, on Monday, May 23, 1994, at 10:00 a.m. Having considered the moving and opposition papers and arguments of counsel, the Court hereby rules as follows:

I. Background

Plaintiffs Vickie L. Edwards and Kathleen Rose McCaulley bring this action to restrain enforcement of the provision of Santa Barbara Code Section 9.99.030 that prohibits "demonstration activities" within certain public sidewalk areas

outside health care facilities and places of worship in Santa Barbara.

On May 18, 1993, the City of Santa Barbara adopted Ordinance No. 4812 (also "Ordinance"), amending the Municipal Code of Santa Barbara by adding a new Chapter 9.99 pertaining to access to public sidewalks within eight feet of the "driveway area" of a health care facility or place of worship. The Ordinance provides, in relevant part:

> 9.99.010 **Definitions**
>
> **D. DEMONSTRATION ACTIVITY.** All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counselling activities.
>
> **E. DRIVEWAY AREA.** That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing vehicular access to adjacent, private property. . .
>
> 9.99.030 **Access to Driveway Areas**
>
> No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship . . .

Santa Barbara Ordinance No. 4812 (emphasis added).

Plaintiffs Edwards and McCaulley allege that they are

"pro-life" anti-abortion sidewalk counselors. Declaration of Vickie Edwards, ¶ 4 ("Edwards Decl."); Declaration of Kathleen Rose McCaulley, ¶ 4 ("McCaulley Decl."). They challenge the constitutionality of the underlined portion of section 9.99.030, alleging that the ordinance deters them from engaging in expressive activities[1] on the sidewalks within eight feet of the "driveway area" of abortion clinics in Santa Barbara.

Defendants do not dispute plaintiffs' standing to bring this action. Although plaintiffs have not been arrested themselves for violating the Ordinance, they have observed other similarly situated "sidewalk counselors" being arrested for violating the eight-foot buffer zone, and have been warned by Santa Barbara police officers. See Edwards Decl., ¶ 13; McCaulley Decl., ¶ 13. Defendants do not dispute that the Santa Barbara Police Department has enforced Ordinance No. 4812, including section 9.99.030, since its enactment in 1993.

II. Analysis

As a preliminary matter, this Court notes it is not necessary to stay this matter pending the Supreme Court's decision in Madsen v. Women's Health Center, Inc., No. 93-880 (Argued April 28, 1994).

While the opinion to be rendered in Madsen may address some of the issues raised in this case, the procedural development of the two cases is quite different. This case involves an ordinance of general applicability which imposes

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[1]Among the expressive activities plaintiffs wish to engage in are: distribution of literature about abortion and abortion alternatives in the form of informational handbills and leaflets; sidewalk counseling; holding signs that contain messages or pictures in opposition to human abortion; engaging in religious prayer. See Edwards Decl., ¶ 11; McCaulley Decl., ¶ 11.

criminal penalties for violations. The Madsen case, by contrast, involves the provisions of a court-ordered injunction with limited applicability to the parties in the case, the provisions of which are only civilly enforceable.

A. Standard of Review for Preliminary Injunction

The Ninth Circuit's traditional test for determining whether to issue a preliminary injunction requires the moving party to demonstrate the following:

1. The moving party will suffer irreparable injury if the injunctive relief is not granted;

2. The moving party has a substantial likelihood of succeeding on the merits;

3. An injunction will not harm the non-moving party more than it helps the moving party; and

4. Granting injunctive relief is in the public interest.

City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985); Martin v. Int'l Olympic Comm., 740 F.2d 670, 674-75 (9th Cir. 1984).

More recently, the Ninth Circuit has articulated an alternative test. Under this test, the moving party must demonstrate either:

1. Probable success on the merits and the possibility of irreparable harm; or

2. The lawsuit raises serious questions and the balance of hardships tips sharply in the movant's favor.

Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

For the purposes of this motion, this Court evaluates whether plaintiffs have shown probable success on the merits and the possibility of irreparable harm.

B. Plaintiffs Have Not Demonstrated that They are Entitled to Preliminary Relief.

1. Irreparable Harm.

"It is undisputed that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). In the instant case, plaintiffs assert that Santa Barbara Code Section 9.99.030 has restricted their First Amendment liberties by preventing them from engaging in their education, counseling, prayer and literature distribution activities within the eight-foot safety zone around the abortion clinics. Thus, this court is satisfied that they have demonstrated the possibility of irreparable harm.

2. Likelihood of Success on the Merits.

Whereas plaintiffs have shown the possibility of irreparable injury if their request for a preliminary injunction is denied, this Court finds that plaintiffs have not met their second burden.

The Ordinance is a Reasonable
Time, Place and Manner Restriction

By regulating political speech, Santa Barbara Ordinance No. 4812 unquestionably implicates the First Amendment. See City of Houston v. Hill, 482 U.S. 451 (1987) (oral protest rests

at the heart of free speech); United States v. Grace, 461 U.S. 171 (1983) (distribution of literature via leafletting is an "expressive activity protected by the First Amendment"). As the Ninth Circuit noted in Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681, 685 (9th Cir. 1988), "[w]hether abortions should be legal is one of the most hotly contested issues of our day."

The face of the Ordinance at issue here proclaims it to be a "necessary time, place and manner restriction," Ordinance No. 4812, p. 1. The test for regulations that regulate speech in public fora, such as public sidewalks, is well-established:

> . . . the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

United States v. Grace, 461 U.S. 171, 177 (1983) (emphasis added); Frisby v. Schultz, 487 U.S. 474, 480 (1988). Further, "strict scrutiny" applies in a case such as this, where there is regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity. U.S. v. Kokinda, 497 U.S. 720, 726 (1990); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

(1) Content Neutrality

Any law that regulates the time, place and manner of protected speech must not be based on the content of the message. E.g., Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992). In Ward v. Rock Against

Racism, 491 U.S. 781, 791 (1989), the Supreme Court stated that "the principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."

Defendants assert that the disputed code section is content- and viewpoint-neutral because it "applies to all demonstration activity regardless of viewpoint or content, without any room for subjective enforcement based on an interpretation or normative evaluation of the 'demonstration activity' or even the viewpoint of the target of the speech." Defendants Memo., p. 19. The asserted reason for its adoption is that "existing law does not adequately protect . . . access to health care facilities." Ordinance No. 4812, p. 2. At the hearing on the motion, defendants' counsel argued that among the citizens cited for violation of the Ordinance was a Planned Parenthood volunteer on the "pro-choice" side of the debate.

Plaintiffs argue that the challenged restriction is content-based because it is intended to shield abortion-bound women and abortion facility personnel from the impact of offensive and emotionally upsetting anti-abortion speech. Plaintiff's Reply Memo., p. 8. Plaintiffs contend that by its own terms, the Santa Barbara Ordinance was adopted to protect persons from the "emotional effects created by such harassing activities . . ." Ordinance No. 4812, p. 1, making it a content-based restriction. See Forsyth County, 112 S. Ct. at 2403 (a "[l]istener's reaction to speech is not a content neutral basis for regulation"); R.A.V. v. St. Paul, Minn., 112 S. Ct. 2538, 2549 (1992) (speech restriction cannot be justified because of the "emotive impact on its audience").

However, there is no evidence in the record before this Court that the councilmembers of Santa Barbara adopted the challenged restriction because of an anti-abortion animus.

Plaintiffs have not supplied this Court with any references to legislative history supporting their assertion that the government's purpose was to chill anti-abortion expressive activities. Moreover, the language of the ordinance indicates that the City's councilmembers were predominantly concerned about safeguarding the rights of persons to enjoy unimpeded ingress and egress from health care facilities, see Ordinance 4812, p. 1-2, a purpose this Court finds is unrelated to speech content. Accord, Portland Feminist Women's Health Center, 859 F.2d at 686. See, Ward v. Rock Against Racism, 491 U.S. at 791 ("[a] regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others"). Given this language and the non-discriminatory enforcement of the Ordinance, this Court finds that the ordinance is content-neutral.

(2) Narrowly Tailored to Serve a Significant Government Interest

Narrowly Tailored

The First Amendment requires that a time, place and manner restriction be narrowly tailored -- that it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby, 487 U.S. at 485 (citation omitted). The question before this Court is whether a total ban on all "demonstration activity" within an eight-foot zone of the driveway of a health care facility is sufficiently narrow and precise to survive First Amendment scrutiny.

Plaintiffs assert that the restriction is unconstitutionally overbroad because "in addition to limiting activities which may be constitutionally forbidden, it also sweeps within its coverage speech which is protected by the guarantees of the First

Amendment." Plaintiffs' Memo., p. 11 (citing Gooding v. Wilson, 405 U.S. 518 (1972); Thornhill v. Alabama, 310 U.S. 88 (1940)). Furthermore, plaintiffs argue, the fact that the absolute ban of section 9.99.030 is limited to the sidewalk areas (eight feet) adjacent to driveways is not sufficient to make it narrowly tailored under the Ninth Circuit's decision in Gerritsen v. Los Angeles, 994 F.2d 570 (9th Cir.), cert. denied, 114 S. Ct. 306 (1993).

In Gerritsen, the city passed an ordinance banning all handbill distribution in certain "blue line" areas of a public park. The Court acknowledged that "[w]hile the ban is narrow in its reach, in that it affects only those specific areas, courts rarely have upheld complete bans on a category of First Amendment expression." Id. at 577. Finding that "the blue-line areas are indistinguishable from other parts of the park," and that the city had produced no evidence "that Gerritsen's handbill distribution interfered with operation of these park areas," the Court held that a total ban on handbilling was unjustified and substantially broader than necessary. Id.

Gerritsen is distinguishable from this case, however, because defendants have identified an area which is obviously different than other areas around the abortion clinic; they have demarcated what is essentially an eight-foot safety zone around the clinic's driveway, with the aim of protecting "the rights of persons seeking to use health care facilities . . . to be free from direct confrontation, hindrance, harassment, intimidation and harm." Ordinance No. 4812, p. 2. Furthermore, defendants have shown that "demonstration activities" within the eight-foot zone interfere with the operation of abortion clinics, by e.g., blocking patients' access to the clinic and "shaking up" patients to a degree that may hinder surgical and other medical procedures. See Declaration of Margaret A. Connell, ¶ 5-6, Defendants' Exhs. 105, 106.

Furthermore, this Court is persuaded by the Ninth Circuit's decision in Portland Feminist Women's Health Center, which held that a portion of an injunction setting up a "free zone" that extends twelve-and-a-half feet to the right and the left of the front door of a hospital and from the front door to the curb was sufficiently narrowly tailored to pass constitutional muster. 859 F.2d at 686.

Significant Government Interest

This Court also finds that the City of Santa Barbara had a significant government interest in enacting the disputed restriction. The Ordinance itself states that "provision of and access to health care services . . . are critically important to the public health, safety and welfare . . . [and] persons attempting to access or depart from health care facilities . . . have been particularly subject to harassing or intimidating activity . . ." Ordinance No. 4812, p. 1. The Ninth Circuit has recognized that the government has a significant interest in ensuring unimpeded access to needed medical services. See Portland Feminist Women's Health Center, 859 F.2d at 686 ("We also find that the interest sought to be vindicated is a significant government interest. . . . [The government has an] interest in protecting the ability of the clinic to provide medical services free from interference that may endanger the health and safety of its patients").

Furthermore, defendants assert, and this Court agrees, that the government has a substantial interest in protecting patients' right to privacy as guaranteed by the United States and California Constitutions. See Roe v. Wade, 410 U.S. 113 (1973) (the right of privacy includes the right to an abortion); Feminist Women's Health Center v. Blythe, 17 Cal. App. 4th 1543, 22 Cal. Rptr. 2d 184, 192 (1993) (exclusion of antiabortion activities within a "speech free zone" serves

patients' privacy interests); Chico Feminist Women's Heath Center v. Scully, 208 Cal. App. 3d 230, 244, 256 Cal. Rptr. 194 (1989) ("[a]rticle I, section I of the California Constitution expressly makes the pursuit and obtaining of privacy an 'inalienable right'").

In sum, this Court finds that the eight-foot "no demonstration activity" zone is sufficiently narrowly tailored to vindicate the City's significant interests.

(3) Ample Alternative Channels for Communication

Lastly, plaintiffs assert that the total ban on the use of the sidewalks adjacent to an abortion facility's "driveway area" fails to allow for ample alternative avenues of communication. Forsyth County, 112 S.Ct. at 2401; Frisby, 487 U.S. at 481. Under the Supreme Court's test, a restriction is invalid if the restricted forum constitutes a "uniquely valuable or important mode of communication." Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 812 (1989).

Plaintiffs argue that it is "self-evident that the sidewalks within proximity to the persons sought to be accessed are 'uniquely valuable.'" Plaintiffs' Memo., p. 16. Plaintiffs complain that the eight-foot distance restriction requires them to yell or hold up signs, thereby diminishing the persuasive impact of their expression. See Meyer v. Grant, 486 U.S. 414, 424 (1988) (the Ordinance "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication . . .")

While it is true that demonstrators cannot hand leaflets to patients and others within the eight foot zone, they may nonetheless engage in all types of oral and visual

communication outside the eight foot perimeter. Moreover, as defendants amply demonstrate via several photographs, plaintiffs have numerous opportunities to leaflet and handbill and in all other ways to engage in expressive activities with clinic visitors once the visitors step outside the eight foot perimeter around the driveway. See Defendants' Exhibits 108-110. In sum, this Court is not persuaded that plaintiffs are severely hampered in their ability to convey their message by the challenged restriction.

III. Conclusion

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' Motion for a Preliminary Injunction is DENIED. This Court finds as a matter of law that the restriction at issue, Santa Barbara Ordinance No. 4812, section 9.99.030, is **content neutral** because it bans all demonstration activities without regard to viewpoint expressed; that it is **narrowly tailored** because it restricts speech within only an eight-foot zone around the driveway of health facilities and places of worship; that it **serves a significant government interest** by protecting the rights of patients to enjoy unimpeded access to medical care and privacy as guaranteed by the United States and California Constitutions; and that it **leaves open ample alternative channels of communication** because it does not regulate any type of speech activity outside the eight-foot boundary. Thus, plaintiffs have not demonstrated probable success on the merits in this case.

IT IS SO ORDERED.

/s/
RICHARD A. GADBOIS, JR.
United States District Judge

DATED: May 24, 1994

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 94-2243 RG (JRx)

VICKIE L. EDWARDS, *et al.*,

Plaintiffs,

v.

CITY OF SANTA BARBARA, *et al.*,

Defendants.

ORDER

Dated March 13, 1995
Filed March 14, 1995
Entered March 15, 1995

This matter came before the Court on Plaintiffs' renewed motion for a preliminary injunction and Defendants' motion for summary judgment. Plaintiffs' motion is **GRANTED** and Defendants' is **DENIED**.

I. BACKGROUND

In May of 1993, the City Council of defendant City of Santa Barbara ("the City") adopted an ordinance limiting protest activity outside medical clinics and places of worship ("the Ordinance"). The Ordinance was passed in the wake of complaints by individuals and organizations about the conduct of anti-abortion protestors. For instance, a representative of a local Planned Parenthood clinic complained that protestors were disrupting traffic, impeding access to the clinic, and confronting patients and staff members in a harassing fashion. *See, e.g.*, Exhibits 103, 104 to Defendants' Opposition to Preliminary Injunction (letters to City Council members from Executive Director of Planned Parenthood of Santa Barbara, detailing incidents and complaints and requesting legislative response). There were also complaints that protestors had confronted abortion providers at their churches.

A. The Ordinance

The Ordinance has two main provisions.[1] Section 9.99.030 ("the Driveway Provision") prohibits all "demonstration activity" on or within eight feet of the driveway of a health care facility or place of worship.[2] "Demonstration activity" is defined to include "all expressive or symbolic content, whether active or passive. . . ." Ordinance at

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[1]The full text of the Ordinance is set forth in the Appendix to this Order.

[2]The second clause of Section 9.99.030 prohibits impeding access to a clinic or place of worship: "No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility." Plaintiffs do not challenge this provision.

9.99.010(D). Section 9.99.020 ("the Bubble Zone Provision")[3] forbids a person from "impeding" or "hampering" access to a health care facility or place of worship by failing to withdraw to eight feet away from a person when the person so requests. This provision is effective in the "access area", which is the area within 100 feet of a health facility or place of worship. Ordinance at 9.99.010(A). Obviously, both provisions encompass activity on public sidewalks.

B. The Instant Suit

This action was brought by two anti-abortion "sidewalk counselors" who challenge the constitutionality of the Ordinance. Plaintiffs Vickie Edwards ("Edwards") and Kathleen Rose McCaulley ("McCaulley") claim that they seek, *inter alia*, to "engage in peaceful hand-to-hand leafletting, one-on-one counseling about abortion alternatives, and periodically hold signs with a pro-life, anti-abortion message." McCaulley Declaration at ¶ 4; Edwards Declaration at ¶ 4. Edwards and McCaulley want to conduct these activities outside of medical facilities providing abortion services within the City.

Both Edwards and McCaulley claim that the Ordinance chills and deters them from this planned expressive activity. Specifically, they claim that they are afraid to engage in any communicative activities within eight feet of a clinic driveway. Edwards Declaration at ¶¶ 12-13; McCaulley Declaration at ¶¶ 12-13. Edwards complains that the Bubble Zone Provision prevents her from conducting effective one-on-one counseling or leafletting, as the eight-foot zone makes it impossible to hand

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[3]Some of the cases on this subject use the term "bubble zone" very broadly to encompass all limited-speech areas. This Court uses it only to describe one specific provision of the Ordinance.

leaflets to people and forces her to speak at a volume that "prevents empathy and sometimes even causes stress." Second Edwards Declaration at ¶ 9-11. Edwards has been arrested for violation of the Driveway Provision, though the charges were dismissed. Fourth Edwards Declaration at ¶¶ 4-10.[4]

Plaintiffs brought the instant suit for injunctive relief against the City and members of the City Council, arguing that the Driveway and Bubble Zone Provisions violate the First Amendment to the United States Constitution. This Court denied a motion for a preliminary injunction against the Driveway Provision in an order dated May 24, 1994.[5]

Plaintiffs now move for a preliminary injunction against both provisions, presenting evidence of legislative history for the first time. Defendants move for summary judgment, arguing that the undisputed facts show that the Ordinance is constitutional.

II. THE LEGAL STANDARDS

A. The Standard for Summary Judgment

Under F.R.C.P. 56, summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c). A

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[4]Based on these facts, there is no question that plaintiffs have standing to make a facial, pre-enforcement challenge to the Ordinance. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988); *Ripplinger v. Collins*, 868 F.2d 1043, 1046 (9th Cir.1989). Defendants do not argue otherwise.

[5]To the extent that this Court's previous ruling is inconsistent with this opinion, it is hereby **VACATED**.

party resisting summary judgment has the affirmative obligation to bring forward evidence "on which the jury could reasonably find for [the nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A mere scintilla of evidence will not suffice. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. The Standard for a Preliminary Injunction

The Ninth Circuit's traditional test for determining whether to issue a preliminary injunction requires the moving party to demonstrate the following:

1. The moving party will suffer irreparable injury if the injunctive relief is not granted;

2. The moving party has a substantial likelihood of succeeding on the merits;

3. An injunction will not harm the non-moving party more than it helps the moving party; and

4. Granting injunctive relief is in the public interest.

City of Tenakee Springs v. Block, 778 F.2d 1402, 1407 (9th Cir. 1985); *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 674-75 (9th Cir. 1984).

More recently, the Ninth Circuit has articulated an alternative test. Under this test, the moving party must demonstrate either:

1. Probable success on the merits and the possibility of irreparable harm; or

2. The lawsuit raises serious questions and the balance of hardships tips sharply in the movant's favor.

Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

Therefore, for the purpose of plaintiffs' motion, this Court must evaluate whether plaintiffs have shown probable success on the merits and the possibility of irreparable harm.

III. AN OVERVIEW OF FIRST AMENDMENT ANALYSIS

This case presents a facial challenge to a time, place, and manner restriction of speech in a public forum. Therefore, the Court's First Amendment analysis will proceed in discrete and predictable stages. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

First, the Court must determine if the Ordinance is content neutral. If the Ordinance is not content neutral, it is presumptively invalid, and will only survive if the City can show that it is necessary to serve a compelling state interest, and narrowly tailored to meet that end. *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 114-18, 112 S.Ct. 501, 116 L.Ed.2d 476, 486-488 (1991). If the Ordinance is content neutral, then it will stand if it is "narrowly tailored to serve a significant government interest." *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d 661.

A restriction of First Amendment activity is narrowly tailored if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487

U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). This Court's determination of whether the Ordinance is narrowly tailored entails a constitutional overbreadth analysis of both the Bubble Zone and the Driveway provisions.

"Only a statute that is substantially overbroad may be invalidated on its face." *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Here, this Court must first determine whether the enactment of the Ordinance reaches a substantial amount of constitutionally protected conduct, *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494, 102 S.Ct. 1186, 71 L.Ed.2d 362. Special scrutiny is called for in the case of a criminal ordinance such as this one. *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed.2d 840 (1948).

IV. CONTENT NEUTRALITY

The first step in the First Amendment analysis of the Ordinance is the question of content neutrality. If the Ordinance is not content-neutral, the City must pass the nearly insurmountable barrier of presumptive invalidity. *See Simon & Schuster*, 502 U.S. at 507-09, 112 S.Ct. at 501, 116 L.Ed.2d at 486-487. If it is content-neutral, then it will pass muster if it is "narrowly tailored to serve a significant government interest." *See Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d at 661; *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Plaintiffs' arguments about content-neutrality may be separated into four discrete areas: the face of the statute; the legislative intent; neutrality of enforcement; and reference to the reaction of the audience.

A. The Face of the Statute

As this Court found in its previous Order, the Ordinance is facially neutral. It does not single out any viewpoint or subject, but applies equally to all expressive activity within the proscribed areas.[6]

B. The Legislative Intent

A facially neutral statute is still presumptively invalid if

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[6]Plaintiffs point to *Sabelko v. City of Phoenix*, 846 F.Supp. 810 (D. Ariz. 1994), in which an Arizona district court found that a similar statute was content-biased on its face. The *Sabelko* Court based its decision on the fact that the statute before it focused on "protest." That statute read:

> Demonstration activity includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities.

Id. at 814. According to the *Sabelko* Court, the emphasis on "protest" meant that the statute turned on the content of the speech or the viewpoint expressed:

> If the speaker "protests," the speech is prohibited by the Ordinance. On the other hand, if the speaker "supports," the speech may or may not be violative of the Ordinance. Thus, the Ordinance imposes criminal liability depending on the content and viewpoint of speech.

Id. at 819.

However, this case is distinguishable from *Sabelko*. In the Ordinance before this Court, "demonstration activity" is defined as:

> *All expressive and symbolic conduct*, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

Ordinance at 9.99.010(D) (emphasis added). Clearly, this extraordinarily broad language does not exclude "support" while targeting "protest," but applies to all conceivable expression. The phrase "all expressive and symbolic conduct" renders the Ordinance facially neutral at the expense of gross overbreadth, as discussed below.

it is designed to suppress a particular viewpoint. "The government may not regulate [expression] based on hostility--or favoritism--towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, ---, 112 S.Ct. 2538, 120 L.Ed.2d 305, 320 (1992). However, it is important to distinguish an attempt to suppress a viewpoint from an attempt to deal with the *effects* of particular conduct or speech:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of the speech *because of disagreement with the message it conveys*. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, *even if it has an incidental effect on some speakers or messages but not others*. Government regulation of expressive activity is content-neutral *so long as it is justified without reference to the content of the regulated speech*.

Ward, 491 U.S. at 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (cites omitted, emphasis added). *See also Renton v. Playtime Theatres*, 475 U.S. 41, 47-49, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Plaintiffs assert that the legislative history of the Ordinance demonstrates that its drafters were motivated by hostility to the anti-abortion viewpoint. In support of this theory, Plaintiffs have submitted extensive legislative history, including letters to City Council members, newspaper articles, and a transcript of the City Council meeting at which the Ordinance was adopted.

However, as *Ward* makes clear, it is not enough to show

that the anti-abortion protests inspired the City Council to act, or that the Ordinance has a disproportionate effect on people with anti-abortion views. Plaintiffs must show that drafters acted out of hostility towards the anti-abortion viewpoint, or in an effort to suppress it. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746, 105 L.Ed.2d at 661.[7]

Plaintiffs fall short of this showing. The legislative history demonstrates that the City Council was motivated by concern that anti-abortion protests were preventing free access to medical clinics and churches. The fact that Planned Parenthood requested the Ordinance because of anti-abortion protests demonstrates nothing more than concern with the *effects* of protest conduct. The flood of letters concerned with access to abortion clinics on the one hand, and the free speech rights of anti-abortion protestors on the other, centered on this issue. Similarly, the extensive citizen statements at the City Council hearing demonstrate concerns about the *effects* of anti-abortion protests and the rights of the protestors. None of this serves as evidence that the Council acted out of animus towards the anti-abortion viewpoint.

Plaintiffs emphasize the comments of City Council member Harold Fairly, who opined that the Ordinance "is content motivated, and that's been made very clear by the nature of today's discussion." Hearing Transcript at 54. However, Mr. Fairly is not an arbiter of content neutrality. The rest of his comments reveal that he shares plaintiffs' incorrect conception of content neutrality: he thinks that the Ordinance is

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[7]Plaintiffs cite *Sabelko* for the opposite proposition. However, as discussed above, the *Sabelko* Court based its finding of content bias on the fact that the ordinance before it banned only "protest" expression outside clinics, unlike the Ordinance here. *Sabelko*, 846 F.Supp. at 819.

content-biased because it was motivated by the effects of anti-abortion protests. He also thinks that the Ordinance would become content-neutral if it dealt with protests at schools as well. Hearing Transcript at 56. Finally, in later comments, he acknowledges:

> For my own case . . . I would not let my vote be interpreted as either being for abortion or against abortion. I am voting on this issue on the basis . . . that it is an access issue.

Transcript at 60. Mr. Fairly's comments do not demonstrate that the City Council acted out of hostility towards a particular viewpoint.

Plaintiffs compare this legislative process with that in *Church of Lukumi v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), in which the Supreme Court struck down a local ordinance because of the viewpoint bias reflected in the legislative history. However, the facts of *Hialeah* are distinguishable from this case. The Hialeah City Council acted not only out of concern for the effects of animal sacrifice, but out of a distinct and pervasive hostility towards the beliefs of the Santeria religion. For instance, the president of the Hialeah City Council asked "What can we do to prevent the Church from opening?" 508 U.S. at --, 113 S.Ct. at 2127, 124 L.Ed.2d at 496. The Resolution adopted by the Hialeah City Council included the statement, "This community will not tolerate religious practices which are abhorrent to its citizens. . . ." *Id.* The Supreme Court found that the "pattern we have recited discloses *animosity to Santeria adherents and their religious practices*. . . ." *Id.* (emphasis added). By contrast, plaintiffs have not demonstrated that the drafters of the Ordinance here bore any hostility towards the anti-abortion viewpoint.

Plaintiffs suggest that they have proved viewpoint animus by showing that certain members of the Santa Barbara City Council were affiliated with pro-choice groups. The Ordinance was requested by the Executive Director of Planned Parenthood of Santa Barbara, who wrote a letter to City Council members Harriet Miller and Eleanor Langer. *See* Plaintiffs' Exhibits Nos. 918-959. Langer was a member of the Board of Directors of Planned Parenthood when the Ordinance was enacted. Plaintiff's Exhibit Nos. 1242. Council member Miller "has attended Planned Parenthood meetings." Mayor Sheila Lodge, who is on the Council, is also a member of Planned Parenthood and serves as a volunteer "escort." Rollings Deposition at P51, L18. Plaintiffs conclude that these affiliations prove viewpoint discrimination. Plaintiffs' Opposition to Summary Judgment at 23. They have proved no such thing. Even though such membership permits an inference that these individuals may disagree with the anti-abortion viewpoint, plaintiffs have utterly failed to connect that disagreement to the enactment of this Ordinance. As discussed above, plaintiffs' evidence shows only that the Council members wanted to protect free access to clinics and churches.

Plaintiffs have not shown that the Ordinance was motivated by disagreement with the anti-abortion viewpoint; in fact, their evidence shows that it was justified by reference to effects, not content. Therefore, their argument about legislative intent must fail. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d 661.

C. Neutrality of Enforcement

Plaintiffs assert that the history of enforcement of the Ordinance demonstrates its viewpoint bias, and argue that a law is not content-neutral when its enforcement turns on scrutiny of the content of expression. *See, e.g., Simon & Schuster*, 502 U.S.

at 115-16, 112 S.Ct. 501, 116 L.Ed.2d at 487 (1991); *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 230, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Hialeah*, 508 U.S. at ---, 113 S.Ct. 2127, 124 L.Ed.2d at 489-490 (1993).

Plaintiffs marshall two arguments in support of this point. First, they show that the vast majority of those cited under the Ordinance (97 out of 101, as of the time of the motion) were anti-abortion protestors. Second, they cite the deposition of a police officer for the proposition that enforcement is based on the content of expression. *See* Deposition of Michael Foxen.

The evidence of arrests is inadequate to show biased enforcement. Plaintiffs merely demonstrate that many anti-abortion demonstrators have been cited under the Ordinance. They present no evidence that protestors with different messages have violated the Ordinance without being arrested. In other words, there is no evidence to rebut the inference that anti-abortion protestors are most often arrested because they are the ones most often in violation of the Ordinance.

Plaintiffs' second argument is more troubling. As they point out, Officer Foxen testified that application of the Ordinance depends on whether someone is expressing some type of an opinion in the prohibited zones. Foxen Deposition at 56. He gives many damning examples; for instance, he says that someone playing a country-western song in the zone would not be in violation, but someone singing an anti-abortion song would be. *Id.* at 51. Moreover, despite defendants' arguments to the contrary, it appears that Officer Foxen has put his views into practice. *See, e.g.*, Foxen Deposition at 29 (person arrested for "expressing his opinion within the zone"); *Id.* at 25 (person arrested because "his being in the zone with the Bible

constituted his attempting to express his opinion within a demonstration-free zone"); *Id.* at 41 (arrest because subject "was, by his presence, . . . attempting to express his opinion").

However, based on this Court's conclusion that the Ordinance is overbroad, it need not resolve the difficult question of whether this pattern of enforcement renders the Ordinance content-based.[8]

D. Dependence on Listener's Reactions

Plaintiffs also assert that the Ordinance is not content-neutral because it makes the legality of speech dependent on the reaction of the audience. It is well established that a "[l]istener's reactions to speech is not a content neutral basis for regulation." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, ---, 112 S.Ct. 2395, 120 L.Ed.2d 101, 114 (1992); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

Plaintiffs' argument on this point must be divided into two themes. First, they suggest that the entire Ordinance is content-biased because it is motivated out of concern for the psychological effects of protest on persons seeking access to the clinics or churches. Second, they argue that the "Bubble zone" provision is content biased because it makes the right to speak within the 8-foot zone dependent on the listener's willingness to tolerate the speech.

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[8]The Court notes that Officer Foxen's testimony provides many practical examples of overbroad application of the Ordinance.

1. Concern with Psychological Effects

It is true that the Ordinance is partially motivated by the "adverse psychological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity." *See* Appendix A. However, this is not the sort of government motivation that runs afoul "listener's reaction" rule as articulated by the Supreme Court. In *Forsyth County*, the Court struck down an ordinance that set a variable fee for parade permits. The fee was calculated depending on the probable cost of police protection for the parade; thus, the vehemence of the opposition to the parade's message determined the cost of the expression. *Forsyth County*, 505 U.S. at ---, 112 S.Ct. 2395, 120 L.Ed.2d at 115. Similarly, the import of the Court's ruling in *Johnson* was that the strength of opposition to flag burning did not justify banning it. *Johnson*, 491 U.S. at 408-409, 109 S.Ct. at 2553, 105 L.Ed.2d 342. In other words, this line of cases does not involve statutes protecting listeners from emotional harm; rather, it dealt with statutes limiting speech because of its tendency to inflame listeners.

By contrast, the Supreme Court has upheld statutes whose rationales include mitigation of harmful emotional and psychological impact. Notably, in *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), the Supreme Court approved Florida's argument that it had a legitimate governmental interest in restricting protests around medical clinics because "targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstance." 512 U.S. at ---, 114 S.Ct. 2516, 129 L.Ed.2d at 609. The Supreme Court based this logic on its prior holding in *Frisby*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), in which the Court found a significant government interest in protecting the tranquility of the home because of the interest of

protecting the privacy of a "captive audience." 487 U.S. at 484-485, 108 S.Ct. 2495, 101 L.Ed.2d 420. This precedent establishes that the Ordinance's concern with emotional impact on listeners does not signify content bias.

Based on these conclusions about content neutrality, this Court must next determine whether the Ordinance is narrowly tailored to serve a significant government interest. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2746, 105 L.Ed.2d 661.

2. The Bubble Zone Provision

Plaintiffs also argue that the Bubble Zone Provision runs afoul of the *Forsyth County* rule on listener reaction because it makes their right to speak dependent on the listener's willingness to hear. This was the rationale of the *Sabelko* Court, which found that a nearly identical "bubble zone" was content biased because it depended on listener reaction. 846 F.Supp at 819.

Faced with a similar "bubble zone" injunction that prohibited protestors from approaching patients without consent, the Supreme Court struck down the injunction as overbroad and declined to engage in content neutrality analysis. *Madsen*, 512 U.S. at ---, 114 S.Ct. 2516, 129 L.Ed.2d at 613 n. 6. This Court elects to take the same approach. Because this Court finds that the Bubble Zone Provision is overbroad, it need not resolve the difficult issue of its content neutrality.

V. NARROWLY TAILORED

"The First Amendment requires that a regulation on free speech be narrow and precise." *City of Houston v. Hill*, 482 U.S. 451, 464-7, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). A law is narrowly tailored "if it targets and eliminates no more than the

exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485, 108 S.Ct. at --- 101 L.Ed.2d 420, *quoting Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Plaintiffs contend that the Driveway and Bubble Zone Provisions are not narrowly tailored to serve a significant governmental interest because they are facially overbroad. In effect, Plaintiffs contend that both provisions impermissibly sweep in protected activity beyond that required to serve the legitimate governmental purpose underlying the ordinance, the protection of access to medical clinics and places of worship.

A. Overbreadth

Under First Amendment overbreadth analysis, an individual may challenge a statute on its face because it threatens others not before the court "who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

In engaging in an overbreadth analysis, this Court must tread lightly. "Only a statute that is substantially overbroad may be invalidated on its face." *Hill*, 482 U.S. at 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), *citing Ferber*, 458 U.S. at 769, 102 S.Ct. 3348, 73 L.Ed.2d 1113. "The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, 'manifestly, strong medicine,' and that 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.'" *Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. 2118, 80 L.Ed.2d 772, citing *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908, 37 L.Ed.2d 830.

1. The Driveway Provision[9]

Plaintiffs argue that the Driveway Provision is overbroad because it completely bans all expressive activity on a public sidewalk, including such traditionally favored activities as passive leafletting and handbilling. *See, e.g., Madsen*, 512 U.S. at ---, 114 S.Ct. 2516, 129 L.Ed.2d at 610. Defendants, in turn, contend that the Driveway Provision is narrowly tailored because it is limited to a zone encompassing the driveway and the eight-foot region immediately adjacent thereto, an area different in kind from other areas surrounding the medical facility. In resolving this issue, this Court must determine whether the Ordinance burdens more speech than is necessary in order to serve the identified governmental interest of ensuring free ingress to and egress from the clinic. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746, 105 L.Ed.2d 661.

"In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates*, 455 U.S. at 494, 102 S.Ct. 1186, 71 L.Ed.2d 362; *Kolender v. Lawson*, 461 U.S. 352, 359, n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In this case, it is apparent from the face of the Driveway Provision that all expressive activity, whether peaceful or harassing, vocal or silent, is prohibited within the eight-foot zone on either side of

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[9]The provision reads: "No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship . . . No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility."

the driveway leading to the clinic.[10] Defendants have thus banned all forms of expressive activity, even silent prayer or expressive t-shirts, from the driveway areas of every medical facility and place of worship in Santa Barbara.

It is axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum. *See, e.g., Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987) ("We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech"); *Madsen*, 512 U.S. at ---, 114 S.Ct. at 2516, 129 L.Ed.2d at 610 (noting distinction between focused picketing, which may be banned, and "generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation"); *Frisby*, 487 U.S. at 486, 108 S.Ct. at 2495, 101 L.Ed.2d 420 ("The type of focused picketing prohibited by [the state court injunction] is fundamentally different from more generally directed means of communication that may not be completely banned in [public places]"); *Perry Educational Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (in traditional public forum, "the government may not prohibit all communicative activity"); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577 (9th Cir. 1993) (invalidating ordinance which prohibited handbilling within certain limited areas of public park).

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[10]The ordinance explicitly defines "demonstration activity" as "all expressive and symbolic conduct, whether active or passive, which shall include but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities." *See* 9.99.010(D). The Driveway Provision apparently excepts expressive conduct engaged in by individuals attempting to traverse the driveway.

The Driveway Provision effectively creates a First Amendment "free zone" in which no one may engage in expressive activity of any kind. *See Jews for Jesus*, 482 U.S. 569, 574, 107 S.Ct. 2568, 96 L.Ed.2d 500. Such a blanket ban necessarily prohibits more expressive conduct than is necessary to achieve the purpose of the Ordinance. Like the resolution at issue in *Jews for Jesus*, the Driveway Provision "prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing" within eight feet of every driveway leading up to every medical facility and place of worship in Santa Barbara. *Id.* It also prevents traditionally favored activities such as leafletting and handbilling. *See Ward*, 491 U.S. at 799, n. 7 ("[A] ban on handbilling, of course, would suppress a great quantity of speech that does not cause evils that it seeks to eliminate"); *accord Sabelko*, 846 F. Supp. at 820 ("The overbreadth of the Ordinance is most evident insofar as it restricts passive leafletting and handbilling even though the Supreme Court has warned against time, place and manner restrictions on such conduct in the public forum").

Although the driveways leading to medical clinics are arguably distinguishable from other public fora, *see Gerritsen*, 994 F.2d at 576, the conduct prohibited must still be narrowly defined vis-a-vis the governmental interest the restriction purports to serve. The disputed language in this case is far broader than the language used in ordinances and injunctions challenged elsewhere, insofar as it encompasses the entire universe of expressive activity.[11] This Court notes that the Driveway Provision carves out an exception for individuals

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[11]Even the ordinance struck down in *Sabelko*, 846 F. Supp. 810, which generally tracks the Santa Barbara ordinance, contains the more restrictive definition of demonstration activity, as including but not limited to "protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education, or counseling activities." *Id.* at 814.

merely attempting to traverse the driveway area; presumably an individual traversing the driveway while incidentally engaging in expressive activity would not violate the face of the Ordinance.[12] Despite this narrow proviso, however, the Driveway Provision still criminalizes expressive activity *qua* expressive activity, without relating such expression to its effect on impeding access to the clinic.[13] Such a sweeping ban on protected First Amendment activity cannot withstand constitutional scrutiny. It is simply not narrowly tailored to achieve its averred purpose, the protection of ingress to and egress from clinics and churches.[14]

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[12]Specifically, the Driveway Provision states:
". . . provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area." 9.99.030.

[13]One need look no further than the record before this Court to find an example of the overbreadth of the Driveway Provision. At least one anti-abortion demonstrator has been cited under the Ordinance for stepping into the eight-foot driveway zone to give literature to someone. *See* Plaintiffs' Supplemental Offer in Support of Their Motion for Preliminary Injunction, 5:7-9.

[14]This Court notes that other driveway buffer zones with a more narrowly defined realm of prohibited activity have been upheld. *See, e.g.*, *Madsen*, 512 U.S. at ---, 114 S.Ct. at 2516, 129 L.Ed.2d at 611 (upholding absolute ban on "congregating, picketing, patrolling, demonstrating or entering" any property within thirty-six feet of the clinic's property line). In so holding, the *Madsen* court noted: "We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic." *Id.* See also *Pro-Choice Network v. Schenck*, 1994 WL 480642, *9 (2d Cir. September 6, 1994) (finding unconstitutionally overbroad an injunction creating a 15-foot buffer zone permitting two demonstrators at a time to enter and engage in sidewalk counselling but noting that, "a different record

(continued...)

Defendants urge this Court that any overbreadth problem in the language of the Driveway Provision is cured by the narrow construction of the Ordinance. It is axiomatic, however, that Santa Barbara cannot avoid the overbreadth problem by narrowing the problematic provision through selective enforcement:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.

Hill, 482 U.S. at 466, 107 S.Ct. at 2502, 96 L.Ed.2d 398, citing *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). According the policy "unconstitutional discretion in enforcement" does not save an overbroad ordinance. *Id.* Criminal statutes such as the one at issue here must be scrutinized with particular care, *see, e.g.*, *Winters*, *supra*, 333 U.S. at 515, 68 S.Ct. 665, 92 L.Ed.2d 840; those that make unlawful a substantial amount of constitutionally protected conduct may be held invalid even if they also have legitimate application. *E.g.*, *Kolender*, 461 U.S. at 359, n. 8, 103 S.Ct. at 1855, 75 L.Ed.2d 903.

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[14](...continued)
revealing greater intransigence by Project Rescue might well support a more restrictive injunction..."); *Portland Fem. Women's H. Ctr. v. Advocates for Life*, 859 F.2d 681, 686 (9th Cir. 1988) (upholding injunction establishing a 25-foot buffer zone against "demonstrating or distributing literature" on the sidewalk in front of the clinic).

This Court notes as well that the final sentence in § 9.99.030, not challenged here, appears to serve the governmental interest of securing safe and unimpeded access to clinics and churches without triggering the same overbreadth problems.

In this case, the Driveway Provision fails to pass muster under the First Amendment because it incorporates the constitutional infirmity of the Ordinance's overbroad definition of demonstration activity and thereby criminalizes the entire universe of expressive activity. Such overbreadth cannot be saved by selective enforcement, no matter how well intentioned. This Court must thus conclude that the Driveway Provision sweeps too broadly.

This Court does not envy city councils across the country the difficult and thankless job of crafting an ordinance that strikes a constitutional balance between ensuring women free access to clinics, often at a difficult and personal moment in their lives, and protecting the First Amendment rights of individuals who disagree with the choice these women are making. Nor is this Court heedless of the increasing violence against clinics here in California and throughout the country. However, legislatures may not seek to redress these societal problems by enacting measures as distinctly overbroad as the one before this Court.

For the foregoing reasons, Defendants' motion for summary judgment as to the Driveway Provision is **DENIED**, and Plaintiffs' motion for a preliminary injunction against enforcement of the Driveway Provision is **GRANTED**.

2. The Bubble Zone Provision

Plaintiffs contend that the Bubble Zone Provision is overbroad because its mandatory withdrawal provision is impermissibly based upon the emotive impact of lawful First

Amendment activity on the audience.[15] Defendants, in turn, argue that the Bubble Zone is simply a form of "legislated politeness" which allows harried passersby to traverse areas of protest.

As an initial matter, this Court notes that violation of the Bubble Zone Provision entails hindering or impeding access to medical facilities and places of worship while engaging in demonstration activity. To the extent that the definition of "demonstration activity" is overbroad, the Bubble Zone Provision suffers from the same constitutional infirmity as the Driveway Provision, *supra*. However, the overbroad definition of demonstration activity, in isolation, fails to invalidate the Bubble Zone Provision because the demonstration activity is only incidental to the conduct regulated by the provision.[16] The Bubble Zone Provision must stand or fall on the constitutionality of the specific prohibition of "impeding" or "hindering" ingress to and egress from the clinic.

The explicit language of the Bubble Zone Provision defines the prohibited conduct as follows:

No person, in the course of demonstration activity . . .,

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[15]That such impact was of concern to the drafters is readily apparent from the face of the Ordinance. *See, e.g.*, Preamble, Ord. 4812 at 1 (noting the "averse physiological and emotional effects of . . . harassing or intimidating activities directed . . . from extremely close proximity.")

[16]This Court does note, however, that the literal language of the Ordinance appears to prohibit impeding access to clinics when committed in the course of demonstration activity, but not when such impeding is not incidental to an expressive purpose. To the extent that this result is intended, and not merely indicative of inartful drafting, it impermissibly singles out expressive activity. *See United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

> shall impede or hamper the free access to or departure from any health care facility or place of worship *by failing to withdraw immediately* to a distance of at least eight (8) feet away from any person who has requested such withdrawal.

9.99.020(A) (emphasis added). The provision further states that "impede" or "hamper" means "to obstruct, hinder or delay." *Id.* It is undisputed that a narrowly drafted prohibition on obstructing access to clinics is constitutional.[17] The provision challenged here, however, defines "obstruct, hinder or delay" with the appositive phrase "by failing to withdraw immediately."[18] The specific category of conduct the provision

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[17]Indeed, Plaintiffs in this case do not challenge the final sentence in 9.99.030, which states in relevant part:

> "No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility."

[18]This Court notes that there are two possible constructions of the prepositional phrase "by failing to withdraw ..." The first view is that the prepositional phrase syntactically renames the prohibited conduct "impede or hamper." Under this interpretation, failing to withdraw necessarily impedes access and hence violates the Ordinance. This is the view adopted by both parties and hence this Court. *See, e.g.*, City's Memorandum of Points and Authorities in Support of Summary Judgment Motion, 20:24-21:2 ("[I]f the demonstrator does not immediately withdraw upon an articulated withdrawal request, he or she is impeding and hampering access and violating the ordinance"); Council Agenda Report, with finished action, of April 20, 1993, 840 (discussing optimal personal space of eight feet in order to "reduce the impact of perceived hostile and angry behaviors directed at a person"); Ordinance Committee Council Agenda Report, April 30, 1993 ("A person's free speech is limited only within the 100 foot access area and *then only if requested by another individual within the eight foot bubble . . .*") (*emphasis added*).

(continued...)

is designed to address is therefore the failure to withdraw upon request. The relevant inquiry for this Court is thus whether the creation of a bubble zone around visitors to the clinic and its immediate environs is a constitutional prohibition on expressive conduct.

The case law and the literal language of the Bubble Zone Provision indicate that it is. This Court notes at the outset that bubble zones more or less comparable to the one at issue here have not fared well recently. In *Madsen*, the Supreme Court struck down an injunction creating a 300-foot bubble zone around a clinic and a requirement that demonstrators refrain from physically approaching anyone unless and until such person indicates a desire to communicate. In so holding, the Court stated:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic.

Madsen, 512 U.S. at ---, 114 S.Ct. at 2529, 129 L.Ed.2d at 613 (*emphasis in original*). In so holding, the *Madsen* court

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[18](...continued)

The second view interprets the prepositional phrase "by failing to withdraw" as constituting a subset of impeding behavior singled out for prohibition. Under this view, failing to withdraw does not *per se* violate the provision. That is, the descriptions of the prohibited behavior are cumulative: The demonstrator must first actively impede access to the clinic, and the demonstrator must then fail to withdraw. This interpretation would pose difficult legal questions. *See* fn. 14, *supra*. However, since it is apparent to this Court that both parties construe the phrase as appositional, rather than conjunctive, this Court need not resolve the conceptual difficulties posed by the second possible interpretation.

specifically stated that the prohibited speech must be independently proscribable (*e.g.*, fighting words or threats) and that the consent requirement alone is sufficient to invalidate the provision. *Id.*

Defendants attempt to distinguish the bubble zone in *Madsen*, which prohibited all approaches within a 300-foot radius of the clinic unless the listener first consents, from the Bubble Zone before this Court, which prohibits such activity only after the listener expresses his or her non-consent. It is clear that the "cease and desist" Bubble Zone challenged here is less restrictive than the "no approach" zone invalidated by *Madsen*. However, this distinction does not alone render the Bubble Zone narrowly tailored:

> [B]oth the cease and desist provision here and the no approach provision in Madsen operate to allow the prospective counselee to control the prospective counselor's opportunity to engage in protected expression. The provisions are thus equally restrictive of the communication offered by the counselors; both effectively condition the demonstrator's right to engage in protected expression on another person's wish to hear such expression.

Pro-Choice Network, 1994 WL 480642, *11 (striking down an injunction creating a fifteen-foot cease-and-desist bubble zone). *See also Sabelko*, 846 F. Supp. at 823 (striking down a permanent criminal injunction creating an eight-foot bubble zone as overbroad because it bans all expressive activity, including handbilling and leafletting, and vests enforcement power in private citizens); *Fargo Women's Health v. Lambs of Christ*, 488 N.W.2d 401 (N.D.1992) (striking down preliminary injunction that completely banned distributing literature to those unwilling to receive it).

The cease and desist provision challenged here, like the broader blanket provision invalidated in *Madsen*, sweeps too broadly.[19] The violation of both provisions is defined in the terms of subjective listener reaction, an impermissibly overbroad basis for limiting expressive conduct that is itself not independently proscribable.[20] Accordingly, the Bubble Zone Provision is unconstitutionally overbroad; it is not readily subject to a narrowing construction by this Court, and its deterrent effect on expression is both real and substantial. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

This Court realizes that the patients and visitors at medical facilities may be particularly vulnerable to solicitation and demonstration activities because entering a medical facility for any kind of treatment is inherently stressful. *See, e.g., International Society for Krishna Consciousness v. Lee*, 505 U.S. 672,---, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541, 553 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.") Indeed, the language of the Preamble to the Ordinance indicates

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[19]Indeed, this Court notes that an anti-abortion protestor would violate the literal language of the Ordinance simply by handing literature to a willing recipient accompanied by and in close physical proximity to a clinic escort who requests that the protestor withdraw.

[20]As noted *supra*, this Court need not reach the question of whether the subjective nature of audience response to the demonstrators' message in this case also renders the Bubble Zone Provision content-based. *See Madsen*, 512 U.S. at --- n. 6, 114 S.Ct. at 2529 n. 6, 129 L.Ed.2d at 613 n. 6.

a belief that individuals entering and exiting medical facilities and places of worship are a captive audience to demonstration activity.

Although this argument is intuitively appealing, *see, e.g.*, *Pro-Choice Network*, 1994 WL 480642, *16 (Oakes, J., dissenting) ("Women who want abortions have no choice but to brave the demonstrations en route to clinics. They are, in effect, a captive audience to the messages of the protestors"), this Court notes that Defendants cite no authority for applying the captive audience doctrine to individuals on public sidewalks en route to medical treatment. Indeed, the captive audience doctrine has traditionally been limited to situations where an individual is at home. *See Frisby*, 487 U.S. at 487. The captive audience doctrine has been applied only sparingly in public fora. *See, e.g.*, *Lehman v. Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (applying the captive audience doctrine to passengers on rapid transit buses). Moreover, the overbreadth problems plaguing the substance of the Driveway and the Bubble Zone Provisions render this case less amenable to a captive audience analysis. *See Sabelko*, 846 F. Supp. at 825, *citing City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd without opinion* 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987).

Accordingly, after careful and difficult consideration, this Court finds the Bubble Zone Provision unconstitutionally overbroad. It is never easy to strike a balance between countervailing constitutional rights. The demonstrations outside of the Santa Barbara clinics no doubt inflict pain and stress on those who enter the clinic, whether for abortions or for other treatments. That such offense is part and parcel of the importance of First Amendment rights under the Constitution, *see, e.g.*, *Boos*, 485 U.S. at 322, 108 S.Ct. at 1157, 99 L.Ed.2d 333, is small comfort to those confronted with viewpoints they

find objectionable at a time when they are most vulnerable to offense. It is equally clear to this Court, however, that those who passionately disagree with a woman's choice to engage in her constitutionally protected right to abortion must be permitted the freedom to express their disagreement in a nonthreatening manner.

For the foregoing reasons, this Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction, and **DENIES** Defendants' Motion for Summary Judgment.

VII. VAGUENESS

Plaintiffs also make a vagueness challenge to the Ordinance. They argue that the Bubble Zone Provision is unconstitutionally vague because it makes the right to speak dependent on listener reaction. They also argue that the "demonstration activity" definition is impermissibly vague. However, this Court's conclusion that the Ordinance is overbroad makes it unnecessary to resolve these difficult questions.

VIII. APPLICATION TO THE MOTIONS

As set forth above, both the Driveway Provision and the Bubble Zone Provision are unconstitutional. Therefore, defendants' motion for summary judgment is **DENIED**; defendants are not entitled to judgment as a matter of law.

Plaintiffs have demonstrated that they will prevail on the constitutional merits. They have also demonstrated that the Ordinance deprives them of First Amendment freedoms, and thus irreparably injures them. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (even brief

deprivations of First Amendment freedoms constitute irreparable injury). Therefore, plaintiffs are entitled to a preliminary injunction. *Gilder*, 936 F.2d at 422. The motion for a preliminary injunction is **GRANTED**, and the City is hereby enjoined from enforcing the Driveway Provision or Bubble Zone provision of the Ordinance.[21]

IX. CONCLUSION

Based on the foregoing, Plaintiff's motion for a preliminary injunction against enforcement of the Driveway and Bubble Zone Provisions is **GRANTED**. As two of the provisions of the Ordinance are unconstitutional, defendants' motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
United States District Judge

Dated: March 13, 1995

APPENDIX

An Ordinance of the Council of the City of Santa Barbara Amending the Municipal Code By Adding a New Chapter 9.99 Pertaining to Access to Health Care Facilities

WHEREAS, provision of an access to health care services and to places of worship are critically and uniquely important to the public health, safety, and welfare so that persons desiring to provide or needing

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[21]Pursuant to F.R.C.P. 65(c), Plaintiffs shall post a $5,000 bond as security for this preliminary injunction.

access to such services should not be hampered, impeded, harassed or intimidated from providing or obtaining those services;

WHEREAS, persons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity tending to hamper or impede their access to or departure from those facilities by persons approaching within extremely close proximity and shouting or waving objects at them;

WHEREAS, such activity near health care facilities and places of worship creates a "captive audience" situation because persons providing or seeking health care services or religious services cannot avoid the area outside of health care facilities or places of worship if they are to provide or receive the health care services or participate in the religious services and the physical and emotional ailments or conditions of patients can make them especially vulnerable to the adverse psychological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity;

WHEREAS, the adverse physiological and emotional effects created by such harassing or intimidating activities may pose health risks, interfere with medical treatment, diagnosis or recovery or cause persons to delay or forgo medical treatment;

WHEREAS, such harassing or intimidating activities that tend to hamper, hinder or impede provision of or access to health care services or to places of worship undermine a person's right to seek preservation of

personal health and legitimate medical treatment, and interfere with a person's freedom of religion;

WHEREAS, this "captive audience" situation requires the enactment of reasonable time, place, and manner restrictions to separate and protect persons expressing their views and persons wishing to access health care facilities and places of worship without direct confrontation, hindrance, harassment or intimidation;

WHEREAS, this ordinance is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of persons near health care facilities and places of worship and the rights of persons seeking to use health care facilities or places of worship to be free from direct confrontation, hindrance, harassment, intimidation and harm;

WHEREAS, this ordinance does not preclude protesting, picketing, demonstrating, or counselling activities near a health care facility or place of worship, but is intended to preclude only those activities involving harassment, intimidation or intrusion which have the effect of foreclosing, hampering, or impeding access to health care services or places of worship and persons seeking to enter or leave health care facilities or places of worship; and

WHEREAS, existing law does not adequately protect such access to health care facilities or places of worship.

Now, therefore, the City Council of the City of Santa Barbara does ordain as follows:

SECTION I. Title 9 of the Santa Barbara Municipal Code is amended by adding Chapter 9.99 which reads as follows:

9.99.010 Definitions

As used in this Chapter, the following terms and phrases shall have the indicated meetings:

A. ACCESS AREA. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

B. HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

C. PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

D. DEMONSTRATION ACTIVITY. All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

E. DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing a vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

9.99.020 Impeding Access Prohibited

A. DEMONSTRATION ACTIVITY -- OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.

B. WITHDRAWAL. For the purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person' body. For

purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof, including, but not limited to, and outstretched arm or handheld sign.

9.99.030 Access to Driveway Areas

No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55595

VICKIE L. EDWARDS and KATHLEEN MCCAULLEY,

Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

MEMORANDUM[1]

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[1]This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3. Accordingly, appellees' request for oral argument is denied.

Submitted November 20, 1995[2]
Filed November 22, 1995

Before: PREGERSON, NORRIS, and REINHARDT, Circuit Judges.

We vacate the district court's preliminary injunction and remand for reconsideration of the motion for the preliminary injunction in light of *Sabelko v. The City of Phoenix*, No. 94-15495, slip op. 13739 (9th Cir. Oct. 19, 1995).

VACATED AND REMANDED.[3]

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[2]The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[3]The various applications for leave to file amicus briefs are denied.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 94-2243 RSWL

VICKIE L. EDWARDS, *et al.*,

Plaintiffs,

v.

CITY OF SANTA BARBARA, *et al.*,

Defendants.

ORDER

July 16, 1996

I. INTRODUCTION

This matter was originally before Judge Gadbois who granted Plaintiff's Motion for Preliminary Injunction, enjoining enforcement of a Santa Barbara City Ordinance regulating demonstration activity at health care facilities and places of worship. Edwards v. City of Santa Barbara, 883 F. Supp. 1379 (C.D. Cal. 1995), vacated by 70 F.3d 1277 (9th Cir. 1995); see Santa Barbara, Cal., Ordinance 9.99.010-.030 (May 1993) [hereinafter "the Ordinance"].

Defendants appealed and the Ninth Circuit remanded the case for proceedings consistent with the Ninth Circuit's decision in Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir. 1995). See Edwards v. City of Santa Barbara, 70 F.3d 1277 (9th Cir. 1995). The case was subsequently transferred to this Court.

On December 7, 1995, Plaintiffs renewed their Motion for a Preliminary Injunction to enjoin enforcement of the Ordinance. See Ordinance §§ 9.99.020, 9.99.030. In an Order dated March 22, 1996, this Court continued the motion and informed the parties that reconsideration would be limited to the impact of the Sabelko decision on Judge Gadbois's ruling.

The matter was continued to April 29, 1996, at which time the Court took the matter under submission pursuant to Federal Rule of Civil Procedure 78 to ensure that all relevant documents were considered. Having reviewed Judge Gadbois's Order and the papers filed in connection with this action, and having considered the impact of the Ninth Circuit's opinion in Sabelko, the Court hereby **GRANTS in part and DENIES in part** Plaintiff's Motion for a Preliminary Injunction.

Plaintiff's Motion is **DENIED** as to section 9.99.020 (the Bubble Zone Provision), but only as that provision applies to health care facilities. Plaintiff's Motion is **GRANTED** as to section 9.99.020 (the Driveway Provision) and as section 9.99.020 (the Bubble Zone Provision) applies to places of worship.

II. BACKGROUND

In May 1993, the City Council of Defendant City of Santa Barbara (the "City") adopted an ordinance limiting activity outside medical clinics and places of worship ("the

Ordinance").[1] The Ordinance was passed in the wake of complaints by individuals and organizations about the conduct of anti-abortion protestors.

The Ordinance is composed of two primary provisions: the "Driveway Provision" and the "Bubble Zone Provision." See Ordinance §§ 9.99.030, 9.99.020. Section 9.99.030--the Driveway Provision--prohibits all "demonstration activity" on or

> within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area.

Ordinance § 9.99.030.[2] Terms used in the Ordinance are defined at sections 9.99.010(A)-(E).

Section 9.99.020--the Bubble Zone Provision--forbids a person from "impeding" or "hampering" the "free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal." Ordinance § 9.99.020. The Bubble Zone provision is operative in the "access area," the area within 100

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[1]The full text of the Ordinance is set forth in an Appendix to this Order.

[2]The second clause of section 9.99.030 prohibits impeding access to a clinic or place of worship. It states, "[n]o person shall impede access to a driveway of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility." Ordinance § 9.99.030. Plaintiffs do not challenge this provision.

feet of a health care facility or place of worship. Ordinance § 9.99.010(A).

Two anti-abortion "sidewalk counselors" brought the instant action challenging the constitutionality of the Ordinance. Plaintiffs Vickie Edwards ("Edwards") and Kathleen Rose McCaulley ("McCaulley") claim that they seek, inter alia, to "engage in peaceful hand-to-hand leafletting, one-on-one counseling about abortion alternatives, and to periodically hold signs with a pro-life, anti-abortion message." (Edwards Decl. ¶ 4; McCaulley Decl. ¶ 4.) Plaintiffs seek to conduct these activities outside medical facilities providing abortion services within the City. Plaintiffs contend that the Ordinance violates their rights under the First Amendment because it deters them from this planned expressive activity.

Judge Gadbois originally granted Plaintiffs' Motion for a Preliminary Injunction and enjoined enforcement of both the Driveway and Bubble Zone Provisions. The City appealed, and in November 1995, the Ninth Circuit vacated the order granting the preliminary injunction and remanded the matter for reconsideration in light of Sabelko v. City of Phoenix, 68 F.3d 1169 (9th Cir. 1995).

In Sabelko, the Ninth Circuit upheld the constitutionality of a similar Bubble Ordinance which made illegal a demonstrator's failure to honor a person's "clearly communicated request" to withdraw to a distance of eight feet it the demonstrator was in a public area within 100 feet of a health care facility. Id. at 1173.

This Court now reviews Judge Gadbois's decision enjoining enforcement of the Ordinance in light of the Ninth Circuit's decision.

III. DISCUSSION

A. Standard for Preliminary Injunction

To obtain a preliminary injunction, a plaintiff must demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that there are serious questions regarding the merits of the action, and the balance of hardships tips sharply in plaintiffs' favor. Metro Publishing Ltd v. San Jose Mercury News, 987 F.2d 637, 639 (9th Cir. 1993); Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991); Johnson Controls, Inc. v. Phoenix Control Sys., Inc., 886 F.2d 1173, 1174 (9th Cir. 1989). Even brief deprivations of First Amendment freedoms constitute irreparable injury. See, e.g., Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976).

These alternative tests represent a continuum of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success on the merits the moving party must demonstrate. San Diego Comm. Against Registration v. Governing Bd., 790 F.2d 1471, 1473 n.3 (9th Cir. 1986); Regents of Univ. of Cal. v. American Broadcasting Companies, Inc., 747 F.2d 511, 515 (9th Cir. 1984). Essentially, the trial court must balance the equities involved and exercise its discretion. International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993).

B. Standard for First Amendment Analysis

In assessing the constitutionality of the Ordinance, the Court must first determine if the Ordinance is content-neutral. An ordinance is content-neutral if it regulates the expression without regard to the message conveyed. Turner Broadcasting Sys, Inc. v. Federal Communications Comm'n, ___U.S. ___ , 114 S. Ct. 2445, 2459 (1994); Ward v. Rock Against Racism,

491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989).

If the Ordinance is not content-neutral, it is presumptively invalid, and can survive only if City can show that it is necessary to serve a compelling state interest and is narrowly tailored to meet that end. Simon & Schuster v. New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 509 (1991).

If the Ordinance is content-neutral, it will stand if it is "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983), quoted in Sabelko, 68 F.3d at 1172; see Ward, 491 U.S. at 791, 109 S. Ct. at 2753.

Only a statute that is substantially overbroad may be invalidated on its face. New York v. Ferber, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361 (1982); Broadrick v. Oklahoma, 413 U.S. 601, 615-16, 93 S. Ct. 2908, 2917-18 (1973). Special scrutiny is appropriate in the case of a criminal ordinance. Winters v. New York, 333 U.S. 507, 515, 68 S. Ct. 665 (1948).

C. The Sabelko Decision

In Sabelko, anti-abortion sidewalk counselors brought an action challenging a Phoenix "Bubble Zone" ordinance that made illegal a demonstrator's failure to honor a person's "clearly communicated request" to withdraw to a distance of eight feet from the person if the demonstrator was in a public

area within 100 feet of a health care facility.[3] Sabelko v. City of Phoenix, 68 F.3d 1169, 1170 (9th Cir. 1995).

Plaintiffs sought declaratory and injunctive relief, contending that the ordinance violated their First Amendment rights. Id. The district court held the Phoenix ordinance unconstitutional and granted a preliminary injunction against its enforcement. Id. at 1171.

Relying heavily on the Supreme Court's decision in Madsen v. Women's Health Center, Inc., ___ U.S. ___, 114 S.

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[3]The Phoenix ordinance states, in pertinent part:

> A. It is unlawful for any person, in the course of demonstration activity within the access area or a health care facility, to fail to withdraw upon a clearly communicated request to do so to a distance of at least eight (8) feet away from any person who has made the request.
>
> B. For purposes of this section:
>
> 1. "Access area" means any portion of a public street or other public place or any place open to the public within one hundred (100) feet of an exterior wall or entryway of a health care facility.
>
> 2. "Demonstration activity" includes but is not limited to protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities.

Sabelko, 68 F.3d at 1175 (quoting Phoenix, Ariz. Ordinance G3705 § 23-10.1 (Nov. 17, 1993).

Ct. 2516 (1994),[4] the Ninth Circuit reversed and remanded with instructions to vacate the injunction. Sabelko, 68 F.3d at 1172-73. The Ninth Circuit concluded that the ordinance was content-neutral because "it makes no reference to the speech it purports to regulate," id. at 1171, and was narrowly tailored because "communication is not prohibited or interrupted, but simply distanced to eight feet." Id. at 1173.

D. Plaintiffs' Request for Preliminary Injunction

1. The Driveway provision

> Section 9.99.030, the Driveway Provision, provides: No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area.

Ordinance § 9.99.030. "Demonstration activity" is defined as

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[4]In Madsen v. Women's Health Ctr., Inc., ___ U. S. ___, 114 S. Ct. 2516 (1994), the Supreme Court upheld a Florida state court injunction against individual named anti-abortion protestors and persons acting in concert with them. The injunction established a 36-foot "buffer zone" around an abortion clinic. Within the buffer zone, defendants were prohibited from virtually all demonstration activity. Id., at 2521-22. The Supreme Court ruled that the injunction was content-neutral despite the fact that it targeted only abortion protestors. Id. at 2523.

The Court also stated that "the State's strong interest in residential privacy, acknowledged in Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988), applied by analogy to medical privacy." Id. at 2526. The Court therefore expressly recognized that persons approaching a health care facility represent a "captive audience." Id.

"[a]ll expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities." Ordinance § 9.99.010(D).

In enjoining the Ordinance, Judge Gadbois held the Driveway Provision unconstitutional because it "incorporates the constitutional infirmity of the Ordinance's overbroad definition of demonstration activity and thereby criminalizes the entire universe of expressive activity." Edwards v. City of Santa Barbara, 883 F. Supp. 1379, 1390 (C.D. Cal. 1995).

The Sabelko decision does not undermine Judge Gadbois's determination that the Driveway Provision is unconstitutional. The fact that both ordinances employ virtually identical definitions of "demonstration activity" does not compel a different result.

Judge Gadbois did not conclude that the Driveway Provision was overbroad solely on the basis of the Ordinance's definition of "demonstration activity." Rather, Judge Gadbois determined that the definition, as applied in the Driveway Provision, "criminalizes expressive activity qua expressive activity, without relating such expression to its effect on impeding access to the clinic." Id. at 1390. Judge Gadbois therefore found that the Driveway Provision was "simply not narrowly tailored to achieve its averred purpose, the protection of ingress to and egress from clinics and churches." Id.

By contrast, Sabelko considered whether an ordinance making it unlawful for a demonstrator to fail to withdraw to a distance of eight feet upon request was unconstitutional. Sabelko, 68 F.3d at 1175. Sabelko did not address the constitutionality of a "speech-free zone provision" which bans

all expression within a designated area.

Sabelko does not, therefore, affect Judge Gadbois's determination that the Driveway Provision is overbroad. Plaintiffs' Motion for a Preliminary Injunction to enjoin the City from enforcing section 9.99.030 of the Ordinance is therefore **GRANTED**.

2. The Bubble Zone Provision

In Sabelko, the Ninth Circuit upheld a "Bubble Ordinance" virtually identical to the Bubble Zone provision at issue in the instant case. The Phoenix ordinance, however, applied only to health care facilities; the Provision in the instant case applies to both health care facilities and places of worship.

a. The Bubble Zone as applied to health care facilities

Judge Gadbois held that the Bubble Zone Provision was unconstitutional because "violation of [the Provision] is defined in the terms of subjective listener reaction, an impermissibly overbroad basis for limiting expressive conduct that is itself not independently proscribable." Edwards, 883 F. Supp. at 1392-93. In Sabelko, however, the Ninth Circuit upheld an essentially identical Phoenix ordinance, concluding that it was both content-neutral and narrowly tailored to serve a legitimate government interest. Under the Ninth Circuit's analysis, therefore, the Bubble Zone Provision at issue in the instant case cannot be held to be overbroad as applied to health care facilities.

Plaintiffs' argument that the subjective nature of audience response to the demonstrator's message renders the

Provision content-based and unconstitutionally vague must also fail in light of Sabelko. Sabelko expressly held that an audience's ability to curtail speech did not render the ordinance content-based because the ordinance made no reference to the speech it purported to regulate. Sabelko, 68 F.3d at 1171-72.

This Court also rejects Plaintiffs' argument that biased enforcement of the Bubble Zone Provision renders it content-based. Plaintiffs contend that the majority of the individuals cited under the Ordinance were anti-abortion protestors. Plaintiffs fail, however, to present evidence that protestors with different messages violated the Ordinance without being arrested.[5]

Plaintiffs also cite the depositions of police officers Michael Foxen ("Foxen") and Michael Aspland ("Aspland") for the proposition that enforcement is based on the content of the expression. A law is not content-neutral when its enforcement turns on scrutiny of the content of expression. See, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115-16, 112 S. Ct. 501, 508 (1991).

Plaintiffs reliance on Foxen and Aspland's deposition testimony is misplaced. The deposition testimony relates to enforcement of the Driveway Provision rather than the Bubble Zone Provision.

Moreover, Foxen testified that enforcement of the Ordinance depended on whether someone was expressing an opinion in the prohibited zones. (Foxen Dep. at 55.) Thus, someone playing country-western songs in the zone would not

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[5]Judge Gadbois also rejected this argument. See Edwards, 883 F. Supp. at 1386.

be in violation, but someone singing an anti-abortion song would. (Foxen Dep. at 51.) Plaintiffs argue that this demonstrates biased enforcement, but Foxen explained that an individual would be in violation of the Ordinance if he expressed any opinion in the prohibited zones. In fact, Foxen maintained that an individual would be arrested for violating the Ordinance if he or she was in the demonstration-free zone conveying a pro-choice message. (Foxen Dep. at 57.) Thus, according to Foxen, enforcement does not depend on what opinion or viewpoint is expressed, but rather, whether an opinion or viewpoint is expressed. (Foxen Dep. at 56-59.)

Similarly, Aspland testified that when deciding whether to issue citations, he did not consider the individual's point of view. (Aspland Dep. at 54.) In fact, Aspland testified that he would not arrest an individual who demonstrated against abortion in the demonstration-free zone (in violation of the Ordinance) if that person was not aware that his or her conduct was contrary to the Ordinance. (Aspland Dep. at 39.)

Foxen and Aspland's testimony regarding enforcement of the Ordinance is insufficient to establish that enforcement of the Ordinance is based on the content of the expression. Because Plaintiffs fail to distinguish the Bubble Zone Provision in the instant case from the Phoenix ordinance upheld in Sabelko, the Bubble Zone Provision at issue in the instant case must also be upheld. Plaintiffs' Motion for Preliminary Injunction to restrict enforcement of section 9.99.020 as it is applied to health care facilities is therefore **DENIED**.

b. The Bubble Zone as applied to places of worship

In traditional public fora, "the government may not

prohibit all communicative activity." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983). The government may, however, "enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample channels of communication." Id.

The First Amendment also "permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." Frisby v. Schultz, 487 U.S. 474, 487, 108 S. Ct. 2495, 2504 (1988). Thus, when speech is directed towards a captive audience, the court will weigh this factor in favor of allowing restriction on that form of expression.

The captive audience doctrine has traditionally been limited to situations where an individual is at home. See id. In Madsen v. Women's Health Ctr., Inc., ___ U.S. ___, 114 S. Ct. 2516, 2526 (1994), however, the Supreme Court concluded that persons approaching a health care facility also represented a captive audience. The Court held that "the State's strong interest in residential privacy, acknowledged in [Frisby], applied by analogy to medical privacy." Id. "While targeted picketing at the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held 'captive' by medical circumstances." Id.

In the instant case, City argues that the captive audience doctrine should be extended to places of worship because "a place of worship is no less a harbor for the exercise of a privacy right than a medical facility." The "captive audience" doctrine, however, is applied sparingly in public fora. Generally, "[w]e expect individuals simply to avoid speech they do not want to

hear." Frisby, 487 U.S. at 484, 108 S. Ct. at 2502. Thus, persons are regularly "captives" of expressive activity that takes place where they are obligated to go; the witness, party, or attorney who must attend a hearing, see, e.g., Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971), the student who must attend school, see, e.g., Tinker v. Des Moines Indep. Community Scho. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969), and the employee desiring to keep his job at a particular store, see, e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736 (1940).

Citing Madsen, the Ninth Circuit extended the captive audience doctrine to persons entering health care facilities. Sabelko, 68 F.3d at 1172. The court's application of the doctrine was, however, based on the public interest in protecting patients requiring medical care at medical facilities. Id. The Sabelko court noted that the interest served by the Phoenix ordinance included a woman's right to abortion and other pregnancy-related treatment, a woman's "medical privacy," and the state's interest in public safety and order. Id. The court concluded that the Phoenix ordinance was sufficiently tailored to protect a woman's physical and psychological well-being by protecting her privacy in obtaining pregnancy-related treatment. Id.

Clearly, such a justification does not exist, and cannot be used, to support a restriction on speech in public fora in proximity to churches, synagogues, mosques, and other defined "places of worship." Nothing in Sabelko justifies extending the captive audience doctrine to persons approaching places of worship.

Plaintiff's request for a preliminary injunction restricting enforcement of section 9.99.020 as it applies to places of worship is therefore **GRANTED**.

V. CONCLUSION

Judge Gadbois concluded that the challenged ordinance violated Plaintiffs' rights under the First Amendment. The Driveway Provision was unconstitutionally overbroad because it banned all expressive activity within a designated area. The Bubble Zone Provision was unconstitutional because violation was based upon listener reaction.

Nothing in Sabelko justifies disturbing Judge Gadbois's ruling on the Driveway Provision. Therefore, Plaintiff's Motion for a Preliminary Injunction enjoining enforcement at section 9.99.030 is **GRANTED**.

The Ninth Circuit's opinion Sabelko, however, compels a different result in regard to section 9.99.020. The Bubble Zone Provision upheld in Sabelko is virtually identical to the provision at issue here, at least as that provision applies to health care facilities. Plaintiff's efforts to distinguish Sabelko are unconvincing. Plaintiff's Motion for a Preliminary Injunction restricting enforcement of section 9.99.020 of the Santa Barbara Ordinance is therefore **DENIED** as it applies to health care facilities.

Nonetheless, there is nothing in Sabelko to justify extending the "captive audience" doctrine to places of worship. Plaintiffs' Motion for a Preliminary Injunction restricting enforcement of section 9.99.020 is **GRANTED** as it applies to places of worship.

IT IS SO ORDERED.

RONALD S. W. LEW

RONALD S.W. LEW
United States District Judge

DATED: July 16, 1996

APPENDIX

An Ordinance of the Council of the City of Santa Barbara Amending the Municipal Code By Adding a New Chapter 9.99 Pertaining to Access to Health Care Facilities

. . .

SECTION I. Title 9 of the Santa Barbara Municipal Code is amended by adding Chapter 9.99 which reads as follows:

9.99.010 Definitions

As used in this Chapter, the following terms and phrases shall have the indicated meetings:

A. ACCESS AREA. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

B. HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not

limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

C. PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

D. DEMONSTRATION ACTIVITY. All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

E. DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing a vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

9.99.020 Impeding Access Prohibited

A. DEMONSTRATION ACTIVITY -- OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately

to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.

B. WITHDRAWAL. For the purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof, including, but not limited to, and outstretched arm or handheld sign.

9.99.030 Access to Driveway Areas

No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall

impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

Santa Barbara, Cal., Ordinance 9.99.010-.030 (May 1993).

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56790

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

No. 96-56262

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

No. 96-56558

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,
v.
CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

ORDER

Filed October 26, 1998

Before: BROWNING, BRUNETTI and FERNANDEZ, Circuit Judges;

Appellees' motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari is granted.

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56790

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

No. 96-56262

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

No. 96-56558

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,
v.
CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

ORDER

Filed October 27, 1998

Before: BROWNING, BRUNETTI and FERNANDEZ, Circuit Judges;

The parties having stipulated thereto, it is hereby ordered that:

1. Plaintiffs-appellees' time for filing a motion for attorney's fees and expenses is tolled until a final determination by the United States Supreme Court is made. Plaintiffs-appellees will have 20 days from either the denial of certiorari or the issuance of the mandate of the United States Supreme Court to submit their

application for attorney's fees.

2. Defendant-appellant will suspend enforcement of Ordinance No. 4128, § 9.99.030, relating to the "driveway provision," until a final determination by the United States Supreme Court is made.

APPENDIX H

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-56790

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND, etc.,
Amici Curiae.

No. 96-56262

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

No. 96-56558

VICKIE L. EDWARDS; KATHLEEN MCCAULLEY,
Plaintiffs-Appellees,

v.

CITY OF SANTA BARBARA,
Defendant-Appellant.

NOW LEGAL DEFENSE AND EDUCATION FUND; CALIFORNIA MEDICAL ASSOCIATION; CITY AND COUNTY OF SAN FRANCISCO,
Amici Curiae.

ORDER

Filed October 6, 1998

Before: BROWNING, BRUNETTI and FERNANDEZ, Circuit Judges;

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX I

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

AMENDMENT XIV [1868].

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and

Judicial officers of a State, or the members of the Legislature thereof. is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation
in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken on oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX J

ORDINANCE NO. 4812

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SANTA BARBARA AMENDING THE MUNICIPAL CODE BY ADDING A NEW CHAPTER 9.99 PERTAINING TO ACCESS TO HEALTH CARE FACILITIES

WHEREAS, provision of and access to health care services and to places of worship are critically and uniquely important to the public health, safety, and welfare so that persons desiring to provide or needing access to such services should not be hampered, impeded, harassed or intimidated from providing or obtaining those services;

WHEREAS, persons attempting to access or depart from health care facilities and places of worship have been particularly subject to harassing or intimidating activity tending to hamper or impede their access to or departure from those facilities by persons approaching within extremely close proximity and shouting or waving objects at them;

WHEREAS, such activity near health care facilities and places of worship creates a "captive audience" situation because persons providing or seeking health care services or religious services cannot avoid the area outside of health care facilities or places of worship if they are to provide or receive the health care services or participate in the religious services and the physical and emotional ailments or conditions of patients can make them especially vulnerable to the adverse psychological and emotional effects of such harassing or intimidating activities directed at them from extremely close proximity;

WHEREAS, the adverse physiological and emotional effects created by such harassing or intimidating activities may pose health risks, interfere with medical treatment, diagnosis or recovery or cause persons to delay or forgo medical treatment;

WHEREAS, such harassing or intimidating activities that tend to hamper, hinder or impede provision of or access to health care services or to places of worship undermine a person's right to seek preservation of personal health and legitimate medical treatment, and interfere with a person's freedom of religion;

WHEREAS, this "captive audience" situation requires the enactment of reasonable time, place, and manner restrictions to separate and protect persons expressing their views and persons wishing to access health care facilities and places of worship without direct confrontation, hindrance, harassment or intimidation;

WHEREAS, this ordinance is a necessary time, place and manner restriction intended to reconcile and protect the First Amendment rights of persons near health care facilities and places of worship and the rights of persons seeking to use health care facilities or places of worship to be free from direct confrontation, hindrance, harassment, intimidation and harm;

WHEREAS, this ordinance does not preclude protesting, picketing, demonstrating, or counselling activities near a health care facility or place of worship, but is intended to preclude only those activities involving harassment, intimidation or intrusion which have the effect of foreclosing, hampering, or impeding access to health care services or places of worship and persons seeking to enter or leave health care facilities or places of worship; and

WHEREAS, existing law does not adequately protect such access to health care facilities or places of worship.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SANTA BARBARA DOES ORDAIN AS FOLLOWS:

SECTION 1. Title 9 of the Santa Barbara Municipal Code is amended by adding Chapter 9.99 which reads as follows:

9.99.010 Definitions.

As used in this Chapter, the following terms and phrases shall have the indicated meetings:

A. ACCESS AREA. Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

B. HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

C. PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and

exclusively for religious worship.

D. DEMONSTRATION ACTIVITY. All expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

E. DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing a vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

9.99.020 Impeding Access Prohibited.

A. DEMONSTRATION ACTIVITY -- OBLIGATION TO WITHDRAW. No person, in the course of demonstration activity within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.

B. WITHDRAWAL. For the purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get

away," or "leave me alone" shall be sufficient to constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request under this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof, including, but not limited to, and outstretched arm or handheld sign.

9.99.030 Access to Driveway Areas.

No person shall conduct any demonstration activity within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area. No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

9.99.040 Private Right of Action.

A. REMEDIES. Any person who is seeking or intends to seek access to a health care facility or place of worship and is aggrieved by an act prohibited by this Chapter may bring an action for damages, injunctive and/or declaratory relief, as appropriate, in a court of competent jurisdiction against any person who has violated, has conspired to violate or proposes to violate its provisions.

B. ATTORNEY FEES - CIVIL PENALTIES. Any person who prevails in such an action shall be entitled to recover from the violator those damages, costs, attorneys' fees and such other relief as determined by the court. In addition to all other damages, the court may award to the aggrieved person a civil penalty of up to One Thousand Dollars ($1,000) for each violation.

C. REMEDIES NOT EXCLUSIVE. The remedies provided by this Section are in addition to any other legal or equitable remedies the aggrieved person may have and are not intended to be exclusive.

Bill No. 4825
Ordinance No. 4812
Adopted May 18, 1993